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FEDERAL COMMUNICATIONS COMMISSION REPORTS
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Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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FCC 74-665

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. Charges, Regulations, Classifications, and Practices for Voice Grade Private Line Service (High-Density-Low-Density Rate Structure) Filed With Transmittal Letter No. 11891	Docket No. 19919

MEMORANDUM OPINION AND ORDER

(Adopted June 25, 1974; Released July 5, 1974)

BY THE COMMISSION:

1. On April 17, 1974, Tel-Parts, Inc., a participant in this proceeding, filed its direct case, entitled "Statement of Tel-Parts, Inc." The Bell System Respondents, on April 30, 1974 filed a Motion to Strike the Statement of Tel-Parts, Inc., which motion was supported by the Trial Staff and opposed by Tel-Parts, Inc.

2. Bell's position is that the Statement of Tel-Parts should be stricken because it was late-filed and Tel-Parts has not shown good cause for such late filing. In its opposition, Tel-Parts states that it was unable to timely file its direct case "because of the internal (the company) delay in obtaining material essential to making its statement and obtaining the approval of the statement."

3. Pursuant to earlier Commission Orders setting forth the procedures to be followed in this proceeding (45 F.C.C. 2d 88, released January 25, 1974; Mimeo No. 19363, released March 12, 1974), the direct cases of all non-Bell participants were to have been filed by April 1, 1974. All participants other than Tel-Parts filed on or before that date. Because of the Commission's expressed objective of expedition in this matter, no late filings will be accepted without a showing that extraordinary circumstances unavoidably require a late filing. Tel-Parts, Inc. has not made such a showing and therefore Bell's Motion to Strike will be granted.

4. Also before the Commission is a "Statement of the Oregon Association of Broadcasters", filed May 13, 1974. This statement will not be admitted into the record for the following reasons: (1) the Oregon Association of Broadcasters (OAB) never filed a notice of its intention to participate herein; (2) as a result, the OAB was never made a participant in this proceeding and was never named in the Commission's Public Notices listing the participants; (3) the OAB statement was filed one and a half months late; and (4) the OAB statement was not served on AT&T or any other party participating in this proceeding.

5. Although we are not admitting into the record either the Statement of Tel-Parts, Inc. or the Statement of the Oregon Association of Broadcasters, we will treat each of these statements as informal comments complaining about AT&T's Hi-Lo tariffs. These statements will thus be associated with the informal comments in letter form which are being associated with the docket file in this proceeding.

6. Accordingly, IT IS ORDERED, that the Motion to Strike filed by the Bell System Respondents is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-722

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
DEPARTMENT OF COMMUNICATIONS, OTTAWA ONTARIO, CANADA
For Information Re the Brockway Co., Licensee of Station WWNY, Carthage, N.Y.

JULY 2, 1974.

MR. R. R. B HOODSPITH,
Director-General, Telecommunications Regulations, Department of Communications, Journal Building, 365 Laurier Avenue West, Ottawa Ontario, Canada K1N6R4.

DEAR MR. HOODSPITH: This refers to the letter of the Honorable Mr. Allan E. Gotlieb, Deputy Minister, Communications, dated August 8, 1972, regarding the granting of the application of The Brockway Company to increase the power of station WWNY-TV, Carthage, New York, and the concern of the Department of Communications with the promotion of that station in Canada.

Inasmuch as station WWNY-TV constructed in accordance with its permit for higher power, its application for licenses to cover its construction permit was granted July 28, 1972. However, on receipt of Mr. Gotlieb's letter, the action granting the licenses was set aside on August 24, 1972, to permit the Commission to consider the matter together with the license applications. Pending such consideration, WWNY-TV was permitted to continue operation with its increased facilities under program test authority.

By letter of July 24, 1964, the then-chairman of the Commission, the Honorable E. William Henry, informed the Canadian Department of Transport that the Commission would "in the future . . . give more attention to applications which could result in television service to Canadian viewers as well as United States viewers, and particularly to those which were designed primarily to afford service to Canada and which tend to frustrate Canadian policy." Mr. Henry also stated the Commission would "ultimately judge such applications on the basis of the service they will provide within the United States."

The Commission has reexamined The Brockway Company's application for increased power with a view toward the principles enunciated in Mr. Henry's letter, and concluded that the licenses should be granted. The increase in power extends the Grade B contour of station WWNY-TV only approximately three additional miles into Canada, over a land area of 354 squares miles. In the United States, the

gain area is 532 square miles, including the city of Potsdam, New York, a community of some 11,650 persons which has heretofore received only one Grade B or better television service. Thus the Commission concluded that the application was not one "designed primarily to afford service to Canada."

Mr. Gotlieb's letter also brought to the Commission's attention certain materials being circulated in Canada to promote the sale of advertising time to station WWNY–TV. One of the items in question, specifically, "Rate Card No. 11," appeared to describe station WWNY–TV as a "Kingston-Watertown, Ottawa" station. The Commission has this day directed to be sent to the licensee the enclosed letter stating that description of the station in that manner in its promotional literature is inconsistent with Commission policy, and requesting the licensee to state to the Commission within 20 days what measures have been adopted or will be adopted to assure conformity with Commission policy.

BY DIRECTION OF THE COMMISSION,[1]
VINCENT J. MULLINS, *Secretary.*

[1] Commissioner Quello concurred in the result.

FCC 74-723

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE BROCKWAY CO., WATERTOWN, N.Y. For Licenses To Cover Construction Permits for Station WWNY-TV, Carthage, N.Y.	BLCT-2160 and BLCT-2161

JULY 2, 1974.

THE BROCKWAY CO.,
260 Washington Street,
Watertown, N.Y.

GENTLEMEN: This refers to your applications (BLCT-2160 and BLCT-2161) for licenses to cover a construction permit for station WWNY-TV, Carthage, New York.

The Commission has this day granted your applications. However, the Commission is in receipt of certain information from the Canadian Office of Communications from which it appears that you have engaged in practices in connection with the sale of advertising which may be misleading as to the location of your station and are therefore inconsistent with Commission policy.

The enclosed rate card for your station is circulated in Canada for the purpose of soliciting Canadian sponsors to purchase advertising on WWNY-TV. The rate card appears to describe WWNY-TV as a "Kingston-Watertown, Ottawa" station. A letter from your counsel to the Commission states that "The reason why the . . . Rate Card No. 11 gives the station designation as 'Kingston-Watertown' is simply that Canadian advertising agencies customarily designate the market as such rather than 'Watertown-Kingston.'"

Station WWNY-TV, as shown on its license, is a Carthage, New York, station. As such, its primary responsibility is to serve the Carthage community. However, Carthage is nowhere mentioned on the attached rate card. It is the obligation of the licensee to be candid in the disclosure of information regarding a station's coverage and location and to refrain from publishing information which tends to be deceptive or misleading. It is the opinion of the Commission that the attached rate card, by omitting any reference to Carthage and describing WWNY-TV as a "Kingston-Watertown, Ottawa" station, may be misleading in that potential advertisers may not be aware that the station's primary obligation is to meet the needs of the community of Carthage, that its obligation to other communities such as Watertown is secondary, and that service to Canada is only incidental to its service to its audience in the United States. As the Commission has stated previously, "The specific location of a station may or may not be of

interest to an advertiser, but that is for an advertiser to decide, not the licensee." *Universal Communications of Pittsburgh, Inc.*, 21 FCC 2d 542 (1970).

Therefore, you are directed to inform the Commission within twenty (20) days what procedures you have adopted or propose to adopt to assure that in the future you will comply with the Commission's policy.

The Commission notes that your license for station WWNY–TV expires June 1, 1975, and that you, therefore, will be required to file an application for renewal of the license no later than February 1, 1975. A copy of this letter will be associated with the WWNY–TV file, and your performance in regard to this matter will be reviewed at the time the Commission considers the renewal application.

BY DIRECTION OF THE COMMISSION,[1]
VINCENT J. MULLINS, *Secretary.*

[1] Commissioner Quello concurred in the result.

FCC 74-724

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES WITH RESPECT TO THE AVAILABILITY OF TELEVISION PROGRAMS PRODUCED BY NON-NETWORK SUPPLIERS TO COMMERCIAL TELEVISION STATIONS AND CATV SYSTEMS	Docket No. 18179

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1974; Released July 12, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration the Request for Stay filed on May 9, 1974, by Scripps-Howard Broadcasting Company, licensee of Station WEWS(TV), Cleveland, Ohio, in which it requests that the Commission stay the effect of its Memorandum Opinion and Order released May 2, 1974 (F.C.C. 74-382, 39 Fed. Reg. 16349), insofar as the provisions of Note 2 to Section 73.658(m) of the Commission's Rules applies to contracts for syndicated programming affecting Cleveland, Ohio television stations and Station WAKR-TV, Akron, Ohio pending a decision on an appeal of the Memorandum Opinion and Order to the United States Circuit Court of Appeals for the Sixth Circuit (*Scripps-Howard Broadcasting Company* v. *F.C.C.*, Case No. 74-1522). Summit Radio Corporation, licensee of Station WAKR-TV, filed its Opposition to the Request for Stay on May 16, 1974. Action on the request for stay by the Commission is a prerequisite to the filing of a request for stay in the Court of Appeals.

2. The Memorandum Opinion and Order, referred to above, modified Section 73.658(m). As originally adopted, the section provided that television stations, in purchasing non-network syndicated programming, could not secure exclusivity against another station located over 25 miles away, as determined by reference points contained in Section 76.53 of the Rules. On reconsideration, the Commission modified this benchmark and permitted television stations to secure exclusivity up to 35 miles as determined by the reference points, mentioned above, and also against stations licensed to another designated community in a hyphenated market specified in the market listings contained in Section 76.51 of the Rules, or for markets below the top 100, in the *ARB Television Market Analysis*. The Commission adopted Note 2 to Section 73.658(m) which reads as follows:

> For a two-year period beginning May 10, 1974, television stations licensed to Cleveland, Ohio, and Stockton, California, may not enter into any contract, ar-

rangement or understanding, express or implied, with a non-network program producer, distributor, or supplier, or other person which prevents Station WAKR–TV, Akron, Ohio, and Station KLOC–TV, Modesto, California, respectively, from broadcasting programs purchased by those Cleveland, Ohio, and Stockton, California stations.

3. WEWS(TV) claims that it has standing to file the request for stay because it operates on Channel 5 in Cleveland, Ohio; that Akron is a designated community listed in the Cleveland-Akron-Lorain television market specified in Section 76.51 of the Rules; that Akron is an integral part of the WEWS(TV) coverage area; that WEWS(TV) covers all but a small part of Akron with its predicted city-grade contour; and also provides network programs and local programs of interest to Akron, including maintaining a full-time newsman in Akron. WEWS(TV) previously participated in the rule making proceeding by filing a statement in support of the petitions for reconsideration, and states that it will suffer serious economic injury as a result of the rule, as modified by the Memorandum Opinion and Order, *supra*, and that WEWS(TV) will feel the impact as soon as the rule becomes effective (May 10, 1974). We agree that WEWS(TV) has standing to file this request for stay. *FCC* v. *Sanders Bros.*, 309 U.S. 470 (1940).

4. As grounds for the stay, WEWS(TV) alleges that the Commission set the general territorial exclusivity benchmark at approximately the Grade A contour standard, but that it, through promulgating Note 2, went through a rule making proceeding merely to protect two stations, so that the final decision is a "private bill", which is not valid rule making, is illegal, and must be set aside. WEWS(TV) contends that the two-year period, prescribed in Note 2, is not a legitimate test procedure because it will result in irreparable injury to WEWS(TV), the other Cleveland television stations and to the public in the area. WEWS(TV) avers that WAKR–TV attempts to cast itself as a small local Akron UHF station operating on the fringes of the Cleveland market, but that this is contrary to the facts. It states that WAKR–TV has been operating since 1953, and is a full-time affiliate of the ABC network; and that it is owned in part by persons with substantial broadcast and other media holdings. WEWS(TV) also notes that the WAKR–TV transmitter is only 23 miles from that of WEWS, and that WAKR–TV places a city-grade signal over all of Cleveland and a large portion of the Cleveland suburban area. WEWS(TV) alleges that WAKR–TV actively solicits advertising in the Cleveland Metropolitan Area in competition with WEWS(TV). WEWS(TV) states that it places a city grade signal over nearly all of Akron, so that WAKR–TV cannot claim that it is an "overshadowed" station, (as stated in the Notice of Proposed Rule Making) "located some distance from, though not entirely out of reach of, the possible reception range of other television stations located in larger markets."

5. WEWS(TV) argues that WAKR–TV simply does not wish to pay the prevailing market price for syndicated programming, and has persuaded the Commission to exempt it from the general territorial exclusivity standards. Thus, it concludes that Note 2 to the rule is discriminatory and not supported by substantial evidence, is arbitrary and capricious and must be set aside.

6. In support of the contention that the rule will cause irreparable injury upon the effective date of the decision (May 10, 1974), WEWS(TV) states that normal forces of free competition will then cease in the Cleveland-Akron market, which will cause irreparable injury to WEWS(TV). Unless the effect of Note 2 is stayed, WEWS(TV) maintains that Cleveland television stations will constantly be "looking over their shoulders", because they will never know if programs they are about to purchase will later be sold to Akron at lower prices. Also, if WEWS(TV) later buys it, there is no way to separate the Cleveland and Akron audiences, and the WEWS(TV) audience will be fractionalized, ruining the product monetarily for WEWS(TV). It is maintained that a sale to WAKR–TV and another Cleveland television station will cause a duplication of programming in the same area contrary to the Commission's policies, and it is contended that the rule also subverts the objectives of the prime-time access rule. Even though the provisions of Note 2 are to be in force for only two years, it is argued that this could result in shifts in audience that would be difficult to restore if the Commission should ultimately decide that the general benchmark of Section 73.658(m) should apply to the Cleveland market.

7. It is further said that the stay will cause harm to no one, including WAKR–TV, because WAKR–TV is a viable licensee with ample financial resources. Wherefore, WEWS(TV) asks that the Commission stay the effect of Note 2 to Section 73.658(m) of the Rules pending action by the Circuit Court of Appeals.

8. In Summit's opposition, it notes that both WAKR–TV and WEWS(TV) are affiliated with the ABC Television Network, and both have been granted program exclusivity for network programming in their respective communities. WAKR–TV states that Akron is in a separate smaller market with only one television station, a UHF station, overshadowed by Cleveland with three VHF stations. It states that Cleveland stations, through their program purchases, by obtaining exclusivity against WAKR–TV have the practical effect of foreclosing product to WAKR–TV to the detriment of the station, both present and future, and to the people of Akron.

9. WAKR–TV strongly opposes the stay because it would simply extend the abuse in exclusivity practices in the Cleveland-Akron situation during the period of the litigation. WAKR–TV contends that Scripps-Howard's claim of irreparable injury is specious, because there is "compelling evidence" that WEWS(TV) is enormously profitable. It cites the *Television Factbook* which shows the net work base hourly rate for WEWS(TV) to be $3,132, while the WAKR–TV rate is $147.[1] It also refers to the 1972 financial data published by the Commission which show that the five Cleveland television stations (3 VHF — 2 UHF) had a combined profit of $9.7 million. Also cited are the 1967 data, the last year for an all VHF market in Cleveland, which showed the total market profit to be $15.8 million. It states that WAKR–TV has operated at a loss in every one of its 21 years of existence, but has not set out the amount of the losses.

[1] *Television Factbook*, 1973–1974 Edition, No. 43 shows the WEWS(TV) rate as $3,132, but the WAKR–TV rate as $119.

10. Then WAKR–TV states that it is questionable whether the opportunity to bid will have any significant economic effect on WEWS(TV) because if the product is available to both Cleveland and Akron stations, there would be a downward price adjustment for Cleveland stations. In support of this last contention, WAKR–TV points out the difference in households delivered in the fall of 1973 for ABC network programming. It states that WAKR–TV delivered 15,000 television households, while WEWS(TV) delivered 292,000 households; and that WEWS(TV) delivered more prime-time households than either the CBS or NBC affiliate in Cleveland. WAKR–TV contends that it would be irreparably injured if a stay is granted.

11. As to likelihood of success on the merits, WAKR–TV states that, in order to prevail, Scripps-Howard must convince the Court of Appeals that the rule making was "arbitrary, unreasonable or otherwise unlawful" and because the Commission has broad discretion in this area, this presents a heavy burden. WAKR–TV argues that Scripps-Howard focused on the fact that the Commission took cognizance of the Cleveland-Akron situation in Note 2 and adopted a remedy for the situation but WAKR–TV states that this is not improper. Thus, WAKR–TV concludes that there has not been any consequential showing that WEWS(TV) is likely to prevail on the merits.

12. In conclusion, WAKR–TV argues that the action taken with respect to the Cleveland-Akron situation was the adoption of a rule to remedy an abusive condition in an overshadowed market which is consistent with all applicable law and policies, and that the effect of this remedy (as contained in Note 2) which would permit WAKR–TV to bid for programming should not be stayed pending the appeal.

13. Both parties have set forth the law governing the Commission's consideration of requests for stay, i.e., there must be a showing of irreparable injury to the public or the petitioner, and of reasonable likelihood of success on the merits of its appeal. Also, both recognize the two key questions: Was the Commission's action prohibiting the television stations licensed to Cleveland, Ohio, from securing territorial exclusivity in their non-network program contracts against Station WAKR–TV, Akron, Ohio, for a two-year period an arbitrary, unreasonable action in a rule making proceeding that adopted a general standard for all other television stations and, will WEWS(TV) or the public suffer irreparable injury if the stay is not granted?

14. The Commission, based on comments filed in the rule making proceeding, and on information contained in the petitions for reconsideration filed against the First Report and Order (which limited exclusivity in the non-network syndicated program contracts to 25 miles) concluded that exclusivity should be permitted up to 35 miles and against stations in designated communities in hyphenated markets because this would prohibit excess exclusivity and is more compatible with the general television market conditions. However, because of specific allegations of difficulties encountered in negotiations for such non-network programming, and also because of the absence of any specific data, the Commission prohibited the Cleveland stations from securing territorial exclusivity against the Akron station and the Stockton, California stations from securing exclusivity against the

Modesto, California UHF station for a two-year period. The Akron and Modesto stations are required to submit specific data concerning their negotiations during this period and the results of such negotiations, so that the Commission can secure a data base on which to take appropriate action in these and other "overshadowed" situations. The Commission's action in creating the two-year exception to the general rule was not an arbitrary or unreasonable act. The Commission considered the programming situations in the two communities based on their allegations of their inability to bid for and negotiate for non-network program fare, and adopted a reasonable solution to gain information to aid ultimately in deciding the matter.

15. For example, WAKR–TV, in its comments filed February 10, 1969, stated at page 13 *et. seq.* the following material:

> From 1966 to January, 1968 NTA was the only supplier of film-programming which continued to sell such programming to WAKR–TV at Akron prices. On January 24, 1968, NTA cancelled all existing contracts but, in the face of threatened litigation, has since agreed to license to WAKR–TV a substitute list of essentially inferior grade feature pictures, which will provide WAKR–TV with "fill programming" but not competitive product.
>
> Over a 30-day period during the Spring of 1968, WAKR–TV initiated inquiries of sixteen major film syndicators, concerning off-network product. Out of some sixty possible series, only fifteen were available to Akron; and of these fifteen all but seven were at Cleveland prices. The rest were principally black-and-white product, and in many instances without sufficient titles to sustain strip programming; moreover this limited available product was comparatively weak from a competitive standpoint.
>
> As recently as late September, 1968, a responsible official of Warner Bros.-Seven Arts discussed with the WAKR–TV Manager a "plan" for making available certain desirable film product at Akron prices, even if such films were sold in Cleveland for contemporaneous exhibition. This encouraging prospect was dashed only two days later, however, when WAKR–TV was advised by Warner Bros.-Seven Arts that all Akron prices were being withdrawn as a matter of "company policy."

16. Because of the foregoing statements, and similar statements by KLOC–TV, Modesto, California, the Commission created the two-year exception specified in Note 2 to enable the Akron and Modesto UHF stations to bid for programming and to supply the Commission with specific data concerning such negotiations to assist it in ultimately resolving the problem. The Commission is definitely not an insurer of the success of a station, but it has the duty to act in situations where unreasonable anti-competitive restraints prevent a station from operating in the public interest. *Cf. U.S.* v. *Paramount Pictures, Inc.* 66 F. Supp. 323, 70 F. Supp. 53 (S.D.N.Y., 1947) noted with approval by the Supreme Court, 334 U.S. 131 (1948). We believe that the provisions specified on Note 2 are a reasonable exercise of the Commission's duty to regulate broadcasting in the public interest as required under the Communications Act of 1934, as amended. Therefore, we are of the opinion that the request for stay must fail because of the lack of likelihood of prevailing on the merits of the appeal.

17. As to irreparable injury, we stated in *Fees Schedule*, 24 F.C.C. 2d 614 (1970), in acting on the requests for stay in Docket No. 18802:

> The major purpose of a stay is "to save the public interest from injury or destruction" while other available remedies are being pursued. *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4, 15 (1942). Thus, even a showing of substantial

private harm is not sufficient where the public interest would be impaired by a grant of the stay. *Yakus* v. *United States*, 321 U.S. 414, 440 (1944). To the extent that private injury may be considered in issuing a stay, the injury must be irreparable. As the Court observed in *Virginia Petroleum Jobbers Association, Inc.* v. *F.P.C.*, 104 U.S. App. DC 106, 110, 259 F 2d 921, 926 (1958). "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."

18. On the question of irreparable injury to itself, we are of the opinion that WEWS(TV) has not made the requisite showing. Contracts executed by WEWS(TV) before August 7, 1973, are fully protected from the provisions of Section 73.658(m), including Note 2. Contracts entered into between August 7, 1973, and May 10, 1974, are subject to the provisions of Section 73.658(m) as revised by the Memorandum Opinion and Order released May 2, 1974, but not to the provisions of Note 2. So WEWS(TV) and the other Cleveland stations are on Notice of the provisions of Note 2 while they are conducting their negotiations for non-network syndicated programming during the period of the Court appeal. They can take reasonable steps to protect themselves from economic loss resulting from any duplication of programming that may be sold to WAKR–TV. WEWS(TV) states that application of the provisions of Note 2 will fractionalize its audience and, should the Commission's decision, as to Note 2, be reversed on appeal, the shift in audience would be difficult to restore. Nothing has been submitted to support this claim. Surely, WEWS(TV) and the other Cleveland television stations will conduct their negotiations and enter into contracts with conditional saving clauses, should the Scripps-Howard appeal be successful.

19. In consideration of the question of injury to the public, we don't think that Scripps-Howard has shown that substantial duplication of programming will occur. We note that both WEWS(TV) and WAKR–TV deliver ABC network programs, and ARB data indicate that WEWS(TV) delivers approximately 20 times more ABC households than does WAKR–TV. Nothing has been presented that would indicate that WAKR–TV would deliver a greater percentage of households for duplicated non-network programming than it does for network programs. We are convinced that the public interest will be served by permitting WAKR–TV to negotiate for non-network program fare, for a limited period of two years, to determine the effect of such competition for programming. In view of the foregoing, we find that there has not been a requisite showing of irreparable injury to WEWS(TV) or to the public.

20. In view of the foregoing, the Request for Stay filed by Scripps-Howard Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-736

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 87 OF THE RULES TO PERMIT THE ASSIGNMENT OF THE FREQUENCIES 4466 KHZ, 4467.5 KHZ, AND 4469 KHZ TO CIVIL AIR PATROL STATIONS IN PUERTO RICO	RM No. 2283

ORDER

(PROCEEDING TERMINATED)

(Adopted July 9, 1974; Released July 16, 1974)

BY THE COMMISSION:

1. The Civil Air Patrol (CAP), a civilian auxiliary of the United States Air Force, has filed a petition for a rule change of Part 87, Aviation Services, to permit the assignment of the frequencies 4466 kHz, 4467.5 kHz, and 4469 kHz to CAP stations in Puerto Rico.

2. The frequencies involved are now available for assignment to CAP stations in the District of Columbia and 20 southeastern states. The petitioner asserts that the frequencies are now utilized to provide direct radio communication between the region headquarters and all of its respective wings (states) located in the Southeast Region, with the exception of the wing located in Puerto Rico, which is not presently authorized the use of these frequencies. The grant of the petitioner's request will enable the CAP Southeast Region headquarters to have direct radio communications with all of its regional wings on the same frequencies and thereby provide a beneficial improvement in CAP communications.

3. We believe that in view of the CAP's contributions during emergency and search and rescue missions in the past, the public interest would be served by approving the petitioner's request for rule amendment in this instance.

4. The Interdepartment Radio Advisory Committee (IRAC) has been consulted in this matter and interposed no objections.

5. The amendment adopted herein pertains to the use of government frequencies used only by the CAP. Since users of other frequencies are not affected, we find the amendment to be minor in nature, and the prior notice, effective date, and procedure provisions of 5 U.S.C. Section 553 are not applicable.

6. In view of the foregoing, IT IS ORDERED, That pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, Part 87 of the Commission's rules is AMENDED, effective July 23, 1974, as set forth in the attached Appendix.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 87 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 87.513(b)(4) is amended to read as follows:

§ 87.513 FREQUENCIES AVAILABLE.

* * * * * * *

(b) * * *

(4) Assignment of the frequencies 4466 kHz, 4467.5 kHz, and 4469 kHz is limited to stations in the District of Columbia, Puerto Rico, and the following States:

Alabama.	New Jersey.
Connecticut.	New York.
Delaware.	North Carolina.
Florida.	Pennsylvania.
Georgia.	Rhode Island.
Maine.	South Carolina.
Maryland.	Tennessee.
Massachusetts.	Vermont.
Mississippi.	Virginia.
New Hampshire.	West Virginia.

* * * * * * *

FCC 74-731

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of COASTAL CABLE TV CO.: GROTON, CONN., LEDYARD, CONN., STONINGTON, CONN. For Certificates of Compliance	CAC-2758 (CT071) CAC-2759 (CT072) CAC-2760 (CT073)

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1974; Released July 11, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; AND REID CONCURRING IN THE RESULT.

1. On June 27, 1973, Coastal Cable TV Company filed the above-captioned applications for certificates of compliance to operate cable television systems at Groton, Ledyard, and Stonington, Connecticut.[1] These communities are not located within any television market. Coastal has requested authorization to carry the following signals on these systems:

WGBH-TV (Educ., Channel 2) Boston, Massachusetts
WFSB-TV (CBS, Channel 3) Hartford, Connecticut
WBZ-TV (NBC, Channel 4) Boston, Massachusetts
WCVB-TV (ABC, Channel 5) Boston, Massachusetts
WTEV (ABC, Channel 6) New Bedford, Massachusetts
WHCT-TV (Ind., Channel 18) Hartford, Connecticut
WTNH-TV (ABC, Channel 8) New Haven, Connecticut
WHNB-TV (NBC, Channel 30) New Britain, Connecticut
WJAR-TV (NBC, Channel 10) Providence, Rhode Island
WEDN (Educ., Channel 53) Norwich, Connecticut
WPRI-TV (CBS, Channel 12) Providence, Rhode Island
WSBK-TV (Ind., Channel 38) Boston, Massachusetts
WNAC-TV (CBS, Channel 7) Boston, Massachusetts
WKBG-TV (Ind., Channel 56) Cambridge, Massachusetts
WWLP (NBC, Channel 22) Springfield, Massachusetts
WHYN-TV (ABC, Channel 40) Springfield, Massachusetts
WNEW-TV (Ind., Channel 5) New York, New York
WOR-TV (Ind., Channel 9) New York, New York
WPIX (Ind., Channel 11) New York, New York
WATR-TV (NBC, Channel 20) Waterbury, Connecticut
WSMW-TV (Ind., Channel 27) Worcester, Massachusetts

Objections to these applications have been filed by Connecticut Educational Television Corporation, licensee of Television Broadcast Sta-

[1] These communities have populations of 38,523, 14,558, and 15,940, respectively. Each system will offer thirty-channel capacity.

tion WEDN, and Connecticut Television, Inc., licensee of Station WHNB–TV. Coastal has replied.

2. Connecticut Educational Television Corporation (CETC) objects to the proposed carriage of Station WGBH–TV. CETC states that it was created by the State of Connecticut to operate on a statewide basis and contends that Station WEDN has the primary responsibility to serve the franchise area. CETC asserts that carriage of WGBH–TV will have an adverse impact on its ability to raise operating and capital fund contributions, resulting in an impairment of its statewide services. Carriage of Station WGBH–TV is consistent with Section 76.57 of the Rules. In *Bridgeport Community Antennae Television Systems*, 44 FCC 2d 711, 713 (1973), we rejected identical contentions by CETC in certifying carriage of distant educational Station WLIW and stated that "an objection by a local educational station does not require automatic denial of distant educational signal carriage, but rather that any objection must be supported by 'probative evidence'." CETC has presented no factual evidence of economic harm that persuades us that a departure from our carriage rules is appropriate. We, therefore, must reject CETC's objection.

3. Coastal holds a certificate of public convenience and necessity from the Connecticut Public Utilities Commission (PUC). Under Connecticut law the PUC, rather than the various municipal governments, constitutes the sole franchising authority. Coastal's franchises were granted by the PUC on May 1, 1973, and thus strict compliance with the franchise standards of our Rules must be demonstrated. At issue in Connecticut Television's objection is whether a tax of 8% of gross earnings levied on cable television systems by the PUC constitutes a franchise fee and, if so, whether it is reasonable within the meaning of Section 76.31(b) of our Rules.[2] Connecticut Television points out that pursuant to state statute PUC regulatees pay two special taxes: a) an annual assessment of approximately 0.05 percent to defray the PUC's operating costs, and b) the gross receipts tax. The latter tax is a revenue-raising rather than a regulatory measure, and the funds so collected go into the state's general fund and not to the PUC. Therefore, Connecticut Television argues that the 8% tax is necessarily excessive and cannot possibly comply with Section 76.31(b) of our Rules. Connecticut Television contends that the franchise tax thus falls within the category of indirect and regressive taxes referred to in Paragraph 185 of the *Cable Television Report and Order*, 36 FCC 2d 143, 209 (1972) and precluded by Section 76.31(b).

4. In its reply, Coastal argues that because the PUC merely levies the tax as required by statute and is powerless to lower or waive it, the tax may not properly be considered a franchise fee at all. In the alternative Coastal argues that even if the tax is a franchise fee, it should be considered grandfathered pursuant to Paragraph 115 of the *Reconsideration of Cable Television Report and Order*, 36 FCC 2d

[2] In *Valley Cable Vision, Inc.*, 38 FCC 2d 959 (1972), *recons. denied*, 40 FCC 2d 191 (1973), we held that franchises granted by the State of Connecticut are in substantial compliance with our franchise standards. Unlike those held by Coastal, the franchises involved in that opinion all were granted prior to March 31, 1972, and thus strict compliance was not required. *Accord, e.g., Bridgeport Community Antennae Television Company*, 44 FCC 2d 711 (1973); and *Systems TV, Inc.*, 45 FCC 2d 1134 (1974).

326, 366 (1972), because the statute imposing the tax was enacted prior to March 31, 1972. The PUC has filed a petition to intervene in which it joins with Coastal in its argument that the 8% franchise tax must, in the final analysis, be considered well within the guidelines of Section 76.31(b) of our Rules. The PUC notes that its regulatees are divided into two groups for payment of the gross receipts taxes: the first group, consisting of cable television systems and telephone companies, pays at the 8% rate; all other regulatees pay 5% but must also pay municipal property taxes from which the 8% group is exempt. Both the PUC and Coastal point to the fact that cable systems actually pay less at the 8% rate than they would if otherwise required to pay a 3% franchise fee plus personal property taxes. Thus, it is contended, the 8% tax fully complies with the intent of our Rules.

5. We need not reach the question of whether the 8% assessment is a franchise fee within the meaning of our rules, for even if it were, we believe the net effect of the Connecticut assessment complies with the intent of Section 76.31(b) of the Rules. At Paragraph 185 of the *Cable Television Report and Order*, 36 FCC 2d 143 (1972), we expressed our concern over high local franchise fees because of the burden such fees might place upon cable's ability to fulfill its role in our national communications policy. In the instant case, however, payment of the 8% excuses payment of the personal property tax and lightens rather than increases the burden that might otherwise be imposed. For example, the total amount to be paid by Coastal over a ten year period under the 8% assessment, is estimated to be $589,280, while the estimated amount of personal property tax excused is $540,262. When the latter amount is offset against the amount required to be paid, the $49,018 remaining may thus be viewed as the real "fee" in question. The net result is demonstrably less than 3% of expected subscriber revenues.[3] Thus we conclude that the Connecticut tax levied on cable television systems is not violative of Section 76.31(b) of the Rules.

In view of the foregoing, the Commission finds that a grant of the above-captioned application is consistent with the public interest.

Accordingly, IT IS ORDERED, That the objections filed by Connecticut Educational Television Corporation, ARE DENIED.

IT IS FURTHER ORDERED, That the objections filed by Connecticut Television, Inc., ARE DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance filed by Coastal Cable TV Company (CAC–2758, 2759, 2760) ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] Gross revenues during the ten-year period upon which the 8% assessment is based are estimated to be $7,366,000; thus, $49,018 would constitute a franchise fee of only 0.67%. Even if the 0.05% assessment described previously were added to this figure, the total 0.72% is well within the permissible limits of Section 76.31(b).

109-003—74——2

FCC 74-740

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re COMMUNITY SERVICE TELEVISION, INC., WILLISTON, N. DAK. Petition for Special Relief	SR-126912-N

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1974; Released July 17, 1974)

BY THE COMMISSION:

1. Community Service Television, Inc., operator of a cable television system at Williston, North Dakota, has filed a "Petition for Limited Waiver" of Section 76.91 (formerly Section 74.1103(e)) of the Commission's Rules,[1] (SR-126912-N), seeking a waiver of its obligation to provide network program exclusivity protection to Station KXMD-TV, Williston, North Dakota. Williston Enterprises, Inc., licensee of Station KXMD-TV, Williston, North Dakota, has opposed this request.

2. Community operates a twelve channel cable television system at Williston and provides the following signals to approximately 1,800 subscribers:

KXMD-TV (ABC/CBS, Ch. 11) Williston, North Dakota
KTVQ (CBS/NBC, Ch. 2) Billings, Montana
KCPX-TV (ABC, Ch. 4) Salt Lake City, Utah
KUMV-TV (NBC, Ch. 8) Williston, North Dakota
KBLL-TV (NBC/ABC, Ch. 12) Helena, Montana
KUTV (NBC, Ch. 2) Salt Lake City, Utah
KUED (Educ., Ch. 7) Salt Lake City, Utah

Station KXMD-TV places a predicted principal community contour over Williston. No other ABC or CBS affiliate places a predicted Grade B or better contour over Williston.

3. Community asks the Commission to waive the network exclusivity protection requirement until Station KXMD-TV transmits a consistently dependable signal. It states that Station KXMD-TV is a satellite of Station KXMC-TV, Minot, North Dakota, 110 miles away,

[1] Section 76.91 states in pertinent part:
"(a) Any cable television system operating in a community, in whole or part, within the Grade B contour of any television broadcast station, or within the community of a 100-watt or higher power translator station shall, on request of the station licensee or permittee, maintain the station's exclusivity as an outlet for network programming against lower priority duplicating signals, but not against signals of equal priority . . . .
"(b) For purposes of this section, the order of priority of television signals carried by a cable television system is as follows: (1) First, all television broadcast stations within whose principal community contours the community of the system is located in whole or part . . . ."

and receives its network feed via a microwave station which receives KXMC–TV's signal about 65 miles from Williston. Community claims that the distance from Minot to Williston combined with the method of transmitting the signal to the satellite results in a signal which drastically varies in video level, noise and color quality. It requests a temporary waiver to continue duplicating ABC and NBC programming until KXMD–TV improves its technical quality. We reject Community's argument and will deny the waiver request for the following reason: Community has failed to submit engineering data necessary to support its allegation of inferior signal transmission. We are unconvinced that the method of signal transmission employed to carry the network feed to Station KXMD–TV's transmitter would cause the serious signal degradation alleged.

In view of the foregoing, we find that a grant of the requested waiver of Section 76.91 of the Commission's Rules would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Limited Waiver" filed December 22, 1969, by Community Service Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That Community Service Television, Inc. IS DIRECTED to comply with the requirements of Section 76.91 of the Commission's Rules on its cable television system at Williston, North Dakota, within thirty (30) days of the release date of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-739

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of COMMUNITY TCI OF OHIO, INC., WINTERSVILLE, OHIO For Certificate of Compliance	CAC-1782 OH287

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1974; Released July 17, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. On January 2, 1973, the above-captioned application was filed for a certificate of compliance to commence operation of a cable television system at Wintersville, Ohio.[1] Wintersville is located within the Wheeling, West Virginia-Steubenville, Ohio, major television market (#90).[2] Community TCI of Ohio, Inc., proposes carriage of the following television broadcast signals:

KDKA-TV (CBS, Channel 2) Pittsburgh, Pennsylvania
WTAE-TV (ABC, Channel 4) Pittsburgh, Pennsylvania
WIIC-TV (NBC, Channel 11) Pittsburgh, Pennsylvania
WQED (Educ., Channel 13) Pittsburgh, Pennsylvania
WQEX (Educ., Channel 16) Pittsburgh, Pennsylvania
WOUC-TV (Educ., Channel 44) Cambridge, Ohio
WUAB (Ind., Channel 43) Lorain, Ohio
WKBF-TV (Ind., Channel 61) Cleveland, Ohio
WTRF-TV (NBC, Channel 7) Wheeling, West Virginia
WSTV-TV (CBS/ABC, Channel 9) Steubenville, Ohio

TCI's proposed signal carriage, as above, is consistent with the provisions of Section 76.63(a) as it relates to Section 76.61 of the Commission's Rules. Although no oppositions have been filed against this application, the Commission notes on its own initiative that TCI's operation would be in violation of the "cross-ownership" prohibitions embodied in Section 76.501 of the Rules.[3]

[1] Rust Craft Cable Communications, Inc., was the original applicant for this certificate. Subsequent pleadings, filed on January 16, 1973, indicated that the name of the applicant was to be changed to Community TCI of Ohio, Inc.

[2] Wintersville has a population of approximately 5,000 persons. TCI proposes to operate a 27-channel capacity cable system there.

[3] Section 76.501 states in relevant part:

"(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in: . . .

"(2) A television broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers); . . .

"NOTE 1: The word 'control' as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

"NOTE 2: The word "interest" as used herein includes, in the case of corporations, common officers or directors and partial (as well as total) ownership interests represented by ownership of voting stock.

"NOTE 3: In applying the provisions of paragraph (a) of this section to the stockholders

2. Wintersville is located within the Grade A contour of Station WSTV–TV, Steubenville, Ohio. Mr. Myles P. Berkman is a director of the applicant's parent company, Tele-Communications, Inc., of Denver, Colorado, and also holds a controlling interest in the Rust Craft Broadcasting Company, licensee of Station WSTV–TV.[4] Additionally, the Rust Craft Broadcasting Company indirectly owns a greater than four percent (4%) interest in TCI.[5] On May 31, 1973, the Rust Craft Broadcasting Company filed a "Petition for Waiver of Rule 76.501" (CSR–376(x)). In that pleading Rust Craft seeks waiver for a number of cable systems that it owned at the time of the imposition of the "cross-ownership" prohibition (July 1, 1970) and later transferred to TCI. In accordance with Section 76.501(b) of the Rules, systems, such as these, that had existing "cross-ownership" violations as of the effective date of the Commission's prohibition, were given until August 10, 1973, to divest themselves of the offending cross-interests. This deadline was later extended to August 10, 1975. In its "Petition for Waiver," Rust Craft proposed removal of Mr. Berkman from TCI's directorate before the above-mentioned deadline, and it requested an additional five (5) year period for divestiture. TCI refers to this "Petition for Waiver" in its instant application.

3. Without commenting upon the merits of the above-described "Petition for Waiver of Rule 76.501," the Commission finds that it is not relevant to the present question. Wintersville issued its franchise on December 5, 1972, long after the effective date of the "cross-ownership" rule. This system is therefore denied even the grace period afforded those systems having pre-existing interests. So long as TCI has an improper "cross-ownership" interest with Rust Craft it may not be certified to operate a new cable system within the Grade B contour of WSTV–TV. Consequently, there remains no reason why we should not rule upon the subject application without further delay, and we find that a grant of the application would be inconsistent with Section 76.501.

In view of the foregoing, we find that a grant of TCI's application would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certificate of Compliance" (CAC–1782) filed by Community TCI of Ohio, Inc., on January 2, 1973, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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of a corporation which has more than 50 stockholders:

"(a) Only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock. . . .

"(b) The provisions of paragraph (a) of this section are not effective until August 10, 1975, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970 (e.g., if a franchise were in existence on or before July 1, 1970): *Provided, however,* That the provisions of paragraph (a) of this section are effective on August 10, 1970, as to such interests acquired after July 1, 1970."

[4] See the completed FCC Form 325 for 1973 submitted as a part of this application.

[5] In an attempted divestiture of its cable television interests to TCI in 1972, Rust Craft Greeting Cards, Inc., received TCI stocks as compensation. Rust Craft Greeting Cards, Inc., is a publicly held corporation, with approximately 2,366,000 shares, whose stock is traded on the American Stock Exchange. The Berkman family owns approximately forty-nine percent (49%) of this company. Rust Craft Greetings Cards, Inc., owns one hundred percent (100%) of Rust Craft Broadcasting Company. Rust Craft Cable Communications, Inc., was totally owned by Rust Craft Broadcasting Company. See the FCC Form 325 for 1971 submitted by Steubenville TV Cable Company for its cable system at Steubenville, Ohio (OH107). Rust Craft Cable Communications is now owned by Tele-Communications, Inc. See FCC Form 325 for 1973 submitted with this application.

FCC 74-691

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE PETITIONS TO DENY APPLICATIONS IN THE DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE

JUNE 28, 1974.

PETITIONS TO DENY APPLICATIONS IN THE DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE

This public notice is to clarify the public notice of April 17, 1974 (Commission Public Notice 10980) setting out new procedures governing petitions to deny filed by existing licensees against applications for new facilities in the Domestic Public Land Mobile Radio Service (DPLMRS). The petitions affected are those alleging that there is an insufficient economic base to support both the existing and the proposed facilities.

In order to evaluate a Petition for Immediate Relief filed by the National Association of Radio Telephone Systems (NARS), and several informal objections as well, we extended the effective date of the April 17 public notice to July 1, 1974. (Commission Public Notice 11757).

The following are the procedures to be instituted:

1. Petitions to deny filed by existing licensees and raising an issue of insufficient economic support will be denied without hearing where a substantial question is not presented by the pleading. Where such a question is presented, the application objected to will be designated for hearing.

2. In those situations where there is on file a petition to deny that presents a substantial and material question of fact as to the capacity of both parties to render a service in the public interest, and also an application for renewal of license filed by the objecting party, we will designate the two applications for hearing to determine whether the contention is valid that the public interest will not be served by the operation of both parties and, if so, which operation will better serve the public interest. If it is found that the market can support an additional carrier, then both the application for new facilities and the licensee's renewal application may be granted.

These procedures do not reflect any substantive policy change with respect to the radio common carrier industry; thus we do not find, as NARS has urged, that they should be the subject of rulemaking. The April 17 public notice stated that we have found competition among radio common carriers to be beneficial to the public; however the new

procedures are not directed to nor based upon any findings of need for increased competition, but are instead an extension of established communications law and procedures. In light of the recent decision in *Hawaiian Telephone Company* v. *FCC*, —— F2d —— (C.A.D.C. 1974), we will specifically warrant why competition will be beneficial in each case. Nevertheless, in *Ashbacker Radio Corporation* v. *FCC*, 326 U.S. 327 (1945), the Court held that if two applications are mutually exclusive, grant of one without a hearing to both is prejudicial to the loser. This principle applies to issues of economic mutual exclusivity, *Collier Electric Company*, 14 RR 848 (1956); see also *Seaboard and Western Airlines, Inc.* v. *Civil Aeronautics Board*, 181 F2d 777 (C.A.D.C. 1949). Therefore, where a petition to deny based upon grounds of harmful economic competition is filed by an existing licensee which has also filed for renewal, a question of mutual exclusivity is raised. The pending renewal and the application for new facilities are competing applications and, as such, are governed by the decision in *Ashbacker*. The fact that the two applications were not filed in close proximity is not important.

The new procedures represent an attempt to protect the public interest by insuring that in those cases where the market can support only one carrier the most qualified applicant will be given the opportunity to render the communications service in question. Insofar as the new procedures appear inconsistent with our decision in *Alert*, 29 FCC 1215 (1960), the instant Order shall prevail.

We are also, by this action, denying the NARS Petition for Immediate Relief. We do not find, as NARS urges us to do, that these procedural modifications constitute substantive changes which should be the subject of rulemaking. As in the past, new applicants will be expected to show that there is a need for an additional licensee in the service area in question, and in each case the licensee retains the prerogative of maintaining a petition to deny based upon harmful economic injury.

To allow all parties sufficient time to consider this statement of policy, the effective date for the new procedures is further extended to July 8, 1974.

Action by the Commission June 26, 1974. Commissioners Lee, Hooks and Quello with Chairman Wiley and Commissioner Reid concurring in the result.

FCC 74-659

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
A CLOSED CIRCUIT TEST OF NATIONAL-LEVEL INTERCONNECTING SYSTEMS AND FACILITIES AND PROGRAM ORIGINATION CHANNELS OF THE EMERGENCY BROADCASTING SYSTEM

ORDER

(Adopted June 25, 1974; Released July 1, 1974)

BY THE COMMISSION:

1. The Commission has received a request from the White House Communications Agency to conduct a Closed Circuit Test of the National-Level interconnecting systems and facilities of the Emergency Broadcast System (EBS) on July 3, 1974, from 2:07 to 2:14:30 P.M. EDT.

2. This request has been coordinated with the major radio networks, the American Telephone and Telegraph Company, and the AP and UPI radio wire services.

3. Coordinated arrangements and voluntary agreement have been obtained from the White House Communications Agency, the Office of Telecommunications Policy, the major Radio Broadcast Networks, (ABC, CBS, IMN, MBS, NBC, NPR, UPI-Audio), and the AT&T.

4. IT IS ORDERED, pursuant to Section 0.381 of the Commission's Rules and Regulations that a closed circuit test of the EBS be conducted on July 3, 1974, from 2:07 to 2:14:30 P.M. EDT, in accordance with Section 73.962 of the rules.

5. Authority for the adoption of this action is contained in Section 1, 4(i), 4(o), and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-755

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (JOHNSTOWN, OHIO; BOYNE CITY, MICH.; GLENNVILLE, GA.; KILMARNOCK, VA.; PINCKNEYVILLE, ILL.; HUNTINGDON, TENN.; AND GRAHAM, TEX.)	Docket No. 19963; RM-2250, RM-2263, RM-2268, RM-2269, RM-2290, RM-2291, RM-2294

REPORT AND ORDER

(PROCEEDING TERMINATED)

(Adopted July 9, 1974; Released July 16, 1974)

BY THE COMMISSION:

1. The Commission has before it the Notice of Proposed Rule Making adopted March 7, 1974 (39 Fed. Reg. 9987), inviting comments on a number of changes in the FM Table of Assignments (Section 73.202(b) of the Rules). The communities, channel assignments proposed, and petitioning parties are as follows:

RM-2250 Channel 276A to Johnstown, Ohio [1] (Richard N. Seiler, Jr.; Robert G. Shaw; John W. Smith)
RM-2263 Channel 228A to Boyne City, Michigan (William F. Gipperich)
RM-2268 Channel 292A to Glennville, Georgia [1] (Tattnall County Broadcasting Company)
RM-2269 Channel 269A to Kilmarnock, Virginia (Northern Neck & Tidewater Broadcasting Co., Inc.)
RM2290 Channel 280A to Pinckneyville, Illinois [1] (Coalbelt Broadcasters)
RM-2291 Channel 265A to Huntingdon, Tennessee [1] (Ernest Vickers, Jr.)
RM-2294 Channel 296A to Graham, Texas (KSWA, Inc.)

2. In each of the above cases, the petitioner seeks the assignment of a first Class A FM channel without requiring any changes in the FM Table of Assignments. The petitioning party for each of the proposed assignments filed supporting statements or comments and reiterated its intent to apply for the channel, if assigned, and to build a station if authorized. All proposals were unopposed except that concerning

[1] In order to meet the minimum spacing requirements of our rules, a site 4 miles north-northeast of Johnstown, Ohio, would be required; a site 3 miles northeast of Glennville, Ga., would be required; a site 8 miles south-southeast of Pinckneyville, Ill., would be required; and a site 3 miles southwest of Huntingdon, Tenn. would be required.

Pinckneyville, Illinois, which was opposed by DuQuoin Broadcasting Company (DuQuoin Broadcasting), licensee of Stations WDQN and WDQN-FM, DuQuoin, Illinois. The Pinckneyville proposals is discussed below.

3. Pinckneyville, (pop. 3,377),[2] the seat of Perry County (pop. 19,757), is located approximately 60 miles southeast of St. Louis, Missouri. DuQuoin (pop. 6,691), also in Perry County, is about 10 miles southeast of Pinckneyville. Pinckneyville has no local aural service; DuQuoin has two—WDQN (daytime-only) and WDQN-FM. Coalbelt Broadcasters (Coalbelt) requested the assignment of Channel 280A to Pinckneyville. The channel could be assigned there in conformance with the Commission's minimum mileage separation rule if the transmitter site is located approximately 8 miles south-southeast of Pinckneyville. Because the site must be so located, we stated in the Notice that there is a question as to the availability of a suitable site from which a station operating on Channel 280A would be able to provide the requisite city-grade signal over Pinckneyville. Both Coalbelt and DuQuoin Broadcasting address this point in their comments. Coalbelt states that with respect to this question it has obtained a statement from a real estate agent familiar with the area and he advises that land is available for sale in Sections 28, 29, 32 and 33, Township 6 South, Range 2 west, in Perry County, which is the area in question relative to a site necessary to meet required co-channel and adjacent channel spacing. Coalbelt attached an engineering statement to its comments which indicates that utilizing an antenna height of 300 feet above average terrain and an effective radiated power of 3000 watts, a city-grade signal (70 dBu) would be placed over the entire community of Pinckneyville from a site at or very near the reference point set forth in its original engineering study.

4. In its comments opposing the Pinckneyville proposal, DuQuoin Broadcasting Company contends that the proposal does not comply with the requirements of Section 73.315(a) of the Commission's Rules in that a substantial portion of Pinckneyville lies beyond the predicted 70 dBu contour of a maximum facility Class A FM station operating from the reference point stated in the original proposal. DuQuoin Broadcasting attached an engineering report to its opposing comments stating that on the basis of terrain profile studies the 70 dBu (3.16 mV/m) contour of a station operating from Coalbelt's reference point, with 3.0 kilowatts at 300 feet above average terrain, cannot meet the Commission's requirement for minimum service to the principal community. DuQuoin Broadcasting states that Coalbelt has chosen a site closer to DuQuoin than to Pinckneyville because Pinckneyville's 1970 Census population of only 3,377 does not offer a very satisfactory economic base for a commercial broadcast operation. It points out that recent data compiled by the State of Illinois show that of the total of $674,524.77 in sales-related State tax receipts (4% of retail sales), $249,127.24 or 37% were collected from sales in DuQuoin and that in contrast tax collections in Pinckneyville totalled only $142,583.88, which is only 21% of the Perry County total.

[2] Population figures are from the 1970 Census.

5. In reply comments, Coalbelt contends that it had its consulting engineer recheck the required co-channel and adjacent channel spacing requirements for Channel 280A, and, from another site which complied with the spacing requirements, it was determined that the required 70 dBu contour of a Class A FM broadcast station operating with maximum height and power would completely encompass the city of Pinckneyville. In response of the DuQuoin contention that the site selected was closer to DuQuoin than to Pinckneyville because Coalbelt was a better economic base, petitioner states that the site was so chosen in order to meet co-channel and adjacent channel spacing requirements. Petitioner states that the economic statistics cited by DuQuoin Broadcasting do not include sales tax figures for coal mined in Perry County but sold elsewhere. Petitioner adds that a new state law provides that sales taxes from the retail sale of coal will be credited to the county from which the coal was mined and that therefore, under this law, an increase in future sales tax figures for Perry County will occur.

6. DuQuoin Broadcasting in reply comments reiterates its opposition to the addition of Channel 280A to Pinckneyville and submits that the petitioner has failed to meet the burden placed upon it in the Commission's Notice of Proposed Rule Making. It contends that the Commission has questioned the availability of a suitable site from which a principal-city-grade site can be placed over Pinckneyville and placed the burden of showing that such a site is indeed available. DuQuoin Broadcasting states that this burden has not been sustained. Its argues that, even though petitioner submitted a letter from a real estate agent in DuQuoin which said that land is available for sale at the reference site, the letter does not discharge petitioner's burden, since the site is not adequate to begin with. DuQuoin Broadcasting states that the land in question is coal land which has been strip mined. DuQuoin Broadcasting attached to its reply comments a letter from the counsel to United Electric Coal Companies, owner of the land in question. Counsel states in the letter that it is his client's past policy not to sell or lease any of its stripped land for any purpose. DuQuoin Broadcasting states that, in view of that statement, it is suggested that something more than the generalized letter of a real estate agent is required for petitioner to show that there is a reasonable expectation that a suitable site will be available.

Decision

7. As a result of the minimum mileage separation requirements, the site of the proposed Pinckneyville station would have to be located about eight miles southeast of the community, and the opponent has alleged that a projected Class A station operating from the petitioner's assumed site would not comply with the provisions of Section 73.315 of the rules. In its reply comments, proponent shows that the location of any station is not restricted to that originally shown in its petition, and that from another site, an FM station would comply with the provisions of Section 73.315 of the rules. The availability of such a site is disputed. Coalbelt's letter exhibit refers to Sections 28, 29, 32

and 33 of land. DuQuoin's letter exhibit refers only to Sections 28 and 29, which leaves a question as to the availability of Sections 32 and 33. In any event, in a rule making proceeding the question as to the availability and suitability of an antenna site in a marginal situation is important only to the extent of whether, if a channel were to be assigned, there is a reasonable assurance that a station would be able to provide an adequate service to the community. The question of whether a specific site is legally available and suitable is a matter to be more appropriately considered in connection with an application for a construction permit for the use of a channel. We believe that the assignment of Channel 280A to Pinckneyville would be in the public interest. Since Pinckneyville does not have a local broadcast station, the assignment of an FM channel there would provide the community with an opportunity to establish an FM station as an outlet for local expression.

8. In arriving at our decision herein, we have given consideration to all comments, supporting statements, and other pleadings. In the Notice of Proposed Rule Making, we set out economic and other information pertaining to the need for a first FM assignment in each of the communities. That information is accepted as being substantially correct and will not be repeated here, except to say that the communities range in size from 841 for Kilmarnock, Virginia, to 7,477 for Graham, Texas (1970 Census), that a daytime-only station operates at Glennville, Georgia, a daytime-only station operates at Graham, and that there are no local broadcast facilities at Johnstown, Ohio; Boyne City, Michigan; Kilmarnock, Virginia; Pinckneyville, Illinois; or Huntingdon, Tennessee. Each of the communities appears to warrant the proposed assignment. We are of the view that adoption of each proposal would serve the public interest.

9. The Canadian Government has given its concurrence to the assignment of Channel 228A and Channel 276A to Boyne City, Michigan and Johnstown, Ohio, respectively.

10. Authority for the adoption of the amendment contained herein appears in Sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

11. In view of the foregoing, IT IS ORDERED, That effective August 23, 1974, Section 73.202(b) of the Commission's Rules, the FM Table of Assignments IS AMENDED to read as follows:

City:	*Channel No.*
Georgia: Glennville	292A
Illinois: Pinckneyville	280A
Michigan: Boyne City	228A
Ohio: Johnstown	276A
Tennessee: Huntingdon	265A
Texas: Graham	296A
Virginia: Kilmarnock	269A

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R–246

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of INDUSTRIAL BUSINESS CORP., OGALLALA, NEBR.	Docket No. 19559 File No. BPH–7317
OGALLALA BROADCASTING CO., INC., OGALLALA, NEBR.	Docket No. 19560 File No. BPH–7364
For Construction Permits	

APPEARANCES

John L. Tierney, on behalf of Industrial Business Corporation; *Richard Hildreth*, *Vincent J. Curtis, Jr.* and *M. Scott Johnson*, on behalf of Ogallala Broadcasting Company, Inc.; and *Michael T. Fitch*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted June 26, 1974; Released July 5, 1974)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. This proceeding involves the mutually exclusive applications of Industrial Business Corporation (Industrial) and Ogallala Broadcasting Company, Inc. (OBC) for construction permits to establish a new Class A FM broadcast station on Channel 228A at Ogallala, Nebraska. OBC is presently the licensee of the only broadcast station in Ogallala, daytime-only standard broadcast Station KOGA.[1] By Commission Order, FCC 72–667, released August 2, 1972 (37 FR 16123, published August 10, 1972), the applications were designated for hearing and limited financial issues were specified against both applicants, as well as a standard comparative issue. The designation Order also states that because OBC proposes to duplicate the programming of its companion AM station (KOGA), evidence regarding program duplication would be admissible under the standard comparative issue. Hearings were held in Washington on November 20, 21 and 23, 1972; evidentiary depositions were taken in Ogallala on February 7 and 8, 1973, pursuant to an Order, FCC 73M–27, released

[1] Channel 228A is the only FM channel presently assigned to Ogallala. By Memorandum Opinion and Order, 42 FCC 2d 720, 28 RR 2d 413, released September 10, 1973, the Commission denied OBC's petition for rule making to assign a second FM channel to Ogallala. Because OBC stated that it was interested in using the channel only if it is unsuccessful in this proceeding. By Memorandum Opinion and Order and Notice of Proposed Rule Making, 39 FR 20401, published June 10, 1974, the Commission denied OBC's petition for reconsideration of the September, 1973, Memorandum Opinion and Order but stated that, because OBC has now indicated that it would amend to the new channel if it is assigned, "further exploration of OBC's proposal for an additional channel was warranted." The Commission also stated that OBC must aver that it would "end its efforts to prevail in hearing. . ." in this proceeding and "agree to effectuate a complete withdrawal . . . from the hearing process." 39 FR at 20402.

January 10, 1973; and at a further hearing session in Washington, these depositions and other evidence were received in evidence and the record was closed. Subsequently, by Order FCC 73M–1035, released September 12, 1973, the record was reopened for the limited purpose of allowing OBC to amend its application by updating a bank letter of credit. The record was closed by the same Order.

2. In an Initial Decision (FCC 73D–55, released October 18, 1973), Administrative Law Judge Frederick W. Denniston found that each applicant had met the limited financial issues specified against it, and, after rejecting OBC's theory of "economic dominance" by Industrial, he recommended a grant to Industrial on the basis of his analysis of the applicants under the comparative criteria. Specifically, after finding that no Industrial principals owned any interest in other mass media, while OBC owns the only radio station in Ogallala, he concluded that Industrial's "substantial" credit for diversification "greatly overshadows OBC's integration of 10% of ownership into management. . . ." He also concluded that Industrial "will bring to Ogallala a much needed second aural service in contrast with the OBC proposal to primarily duplicate its existing [AM] programming." Paragraph 44 of the Initial Decision.

3. The proceeding is now before the Review Board on exceptions filed by OBC and Industrial. We have reviewed the Initial Decision in light of the exceptions, the arguments of the parties,[2] and our examination of the record. We find the Administrative Law Judge's findings of fact to be substantially accurate and complete and his conclusions persuasive. Therefore, except as modified in this Decision and in the rulings on exceptions contained in the attached Appendix, and upon a finding that the public interest would be served thereby, Judge Denniston's Initial Decision is adopted.[3] In our view, the only matter which warrants further discussion relates to the questions of procedure OBC raises in its exceptions.

4. OBC argues that it was denied a full hearing and due process as a result of the Judge's allowing Industrial to take evidentiary depositions[4] of its principals in Ogallala. OBC insists that the only way to correct the substantial procedural errors committed by the Judge is to remand the proceeding for a new hearing. The record shows that prior to hearing, the Judge ordered the parties to exchange their proposed testimony in written form together with a list of all witnesses required for both direct and cross-examination (FCC 72M–1141, released September 11, 1972). In response, OBC listed its witnesses "in support of its direct case", all of whom were principals or employees of OBC, and then stated that, "in addition, it is expected that testi-

[2] Oral argument was held before a panel of the Review Board on June 4, 1974. On the same day as oral argument, but prior thereto, the Board heard argument as to whether the oral argument should be postponed, as requested in OBC's motion for postponement of oral argument, filed June 3, 1974. The Board denied OBC's motion (Tr. 401) and hereby formalizes that ruling.

[3] The Board will also grant: (a) OBC's motion, filed June 3, 1974, to reopen the record for the limited purpose of accepting an amendment evidencing an extension of credit to the applicant; and (b) Industrial's January 9, 1974, motion to accept late filing of its reply brief.

[4] OBC has apparently confused the two general types of depositions and their uses, namely, depositions for the *discovery* of relevent facts and *evidentiary* depositions for the production and preservation of evidence for use at the hearing. The depositions taken in Ogallala were of the latter type. See Sections 1.311–1.325 of the Commission's Rules.

mony will also be elicited concerning the economic dominance of the principals of [Industrial] in Ogallala, Nebraska." In its response, Industrial included, *inter alia*, an affidavit from one of its principals and officers, Willard Soper, stating that neither he nor any other Industrial principal had any other mass media interests; affidavits from each of the other stockholders to that effect were also included. Both counsel also requested that nearly all the witnesses of the opposing applicant be produced for cross-examination, four on behalf of OBC and thirteen on behalf of Industrial. At the hearing, however, only Soper and one other stockholder of Industrial appeared,[5] even though OBC's counsel had not been notified that the other requested stockholders would not appear. Because the other principals were not made available for cross-examination, the Presiding Judge admitted only those affidavits of the witnesses present at the hearing in Washington. On the other hand, when OBC sought to cross-examine the Industrial witnesses who were present it became apparent that OBC was interested only in their other business interests in an effort to establish economic dominance of Ogallala on the part of Industrial under the standard comparative issue.[6] Thus, OBC offered no direct testimony to prove economic dominance, but rather undertook to elicit such testimony by cross-examination of the Industrial witnesses, whose direct testimony was limited to a statement of their media interests.

5. After the initial hearing, in which Industrial's affidavits regarding media ownership had been for the most part rejected, Industrial sought permission, pursuant to Commission Rule 1.315, to take evidentiary depositions in Ogallala of the ten stockholders in question for the limited purpose of determining the other stockholder's mass media interests. OBC vigorously opposed the request. In a Memorandum Opinion and Order, FCC 73M–27, released January 10, 1973, the Judge allowed the taking of depositions.[7] At the deposition proceeding, Industrial's counsel inquired only as to the other media ownership interests of the deponents, usually asking no more than five or six questions. OBC's counsel then conducted a lengthy inquiry pursuant to its theory of economic dominance into all aspects of each of the deponent's business and civic backgrounds. This often took forty to fifty pages.

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[5] Also called by Industrial was the banker responsible for the loan supplying the major portion of Industrial's financing. OBC cross-examined him not only as to Industrial's financial qualifications, but also as to OBC's theory of economic dominance. See note 6, *infra*.

[6] Throughout this proceeding, OBC has argued that Industrial's principals dominate the community of Ogallala and that it would be contrary to the public interest to grant the Industrial application in light of this alleged economic dominance. Thus, OBC petitioned the Review Board for a disqualifying economic dominance issue against Industrial, which was rejected (40 FCC 2d 69, 26 RR 2d 1447), and also sought permission to pursue the matter under the standard comparative issue, citing *Kentucky Central Television, Inc.*, 4 FCC 2d 227, 8 RR 2d 330 (1966).

[7] The Judge stated that "under ordinary circumstances" he would not give Industrial a "second try" at proving its case. However, he went on to say: "The basic cause of the present situation is, however, that [OBC] embarked on a carefully charted course of obscuring the manner in which it intended to proceed by seeking the addition of the economic dominance issue by the Review Board even while contending it was already in issue [*i.e.*, comparatively]; not offering any evidence on that issue in the written distribution or specifying how this information would be "elicited"; and by requesting Industrial to sustain the expense of producing thirteen witnesses for the primary purpose of cross-examining them, not on their direct testimony, but on the affirmative issue which it seeks to establish. Industrial, on the other hand, failed in its obligation by not honoring the request for production of witnesses or even giving prior notice of its intention in that regard. On balance, the equities favor Industrial and the taking of depositions. . . . will be approved. . . .

An examination of the depositions reveals that the deponents fully and completely answered all questions asked, and OBC, in its ninety-three exceptions, did not file one exception to the accuracy of any of the information contained therein. The depositions, which consist of approximately 600 pages, were received into evidence over OBC's objection on May 31, 1973, and the record was closed on that date.

6. The Board is of the opinion that the Administrative Law Judge's resolution of the procedural difficulties is within the limits of permissible discretion and that his rulings should be upheld. It is well established that the Presiding Judge has plenary authority to regulate the course of the hearing and to dispose of requests to take depositions; [8] and in view of the unusual circumstances created by the conduct of both parties, the Board does not consider the Judge's rulings an abuse of this discretion. The record shows that OBC attempted to make Industrial bear the cost of bringing in witnesses to prove its (OBC's) affirmative case on economic dominance; moreover, OBC's notification of proposed testimony and witnesses to be called [9] did not adequately indicate to Industrial that it intended to examine Industrial's witnesses on economic dominance, and thus did not comport with the Judge's Order of September 11, 1972, which was adopted in order to prevent surprise.[10] Thus, while the Judge permitted inquiry into economic dominance under the standard comparative issue,[11] it would have been desirable for such inquiry to have been undertaken as a part of OBC's affirmative case by the calling of any witnesses it considered relevant to a presentation of its direct case. In any event, OBC's intentions as to how it intended to pursue the issue should have been clearly communicated to both Industrial and the Judge.[12] In sum, the Board believes that the Judge's rulings struck a reasonable balance between the conduct of counsel for both parties that resulted in the public interest being served. *Cf. Equal Employment Opportunity Commission, supra.*

7. Equally significant in the Board's view is OBC's total failure to support its primary contention that it was ultimately prejudiced by the Judge's rulings. OBC's argument that the absence of the Judge at the post-hearing taking of depositions denied him the opportunity

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[8] See Section 409(h) of the Communications Act of 1934, as amended; and Sections 1.243, 1.315 and 1.321 of the Commission's Rules. See also *Report and Order on Adoption of Discovery Procedures*, 11 FCC 2d 185, 11 RR 2d 1961 (1968); *RKO General, Inc.*, 27 FCC 2d 989, 21 RR 2d 375 (1971); *Liberty Television*, FCC 68-366, 14 RR 2d 71 (1968). *Cf. Tinker, Inc.*, 4 FCC 2d 372, 7 RR 2d 677 (1966); *Equal Employment Opportunity Commission*, 38 FCC 2d 33, 25 RR 2d 813 (1972).

[9] After listing its witnesses "in support of its direct case", (*i.e.*, all employees or stockholders of OBC), OBC then stated that "in addition, it is expected that testimony will also be elicited concerning the economic dominance of the principals or [Industrial]."

[10] While we believe the Judge's Order was clearly within his discretion, OBC's exception to it is, in effect, moot in light of the undisputed fact that OBC was allowed to pursue its case on economic dominance through cross-examination. In short, OBC has not shown how it was prejudiced by the Order.

[11] In this regard, it should be noted that OBC pursued the presentation of its case through cross-examination, both at the hearing and at the taking of depositions. Thus, the basic purpose of cross-examination has been served, *i.e.*, a "full and true disclosure of the facts" has been made. See *Chapman Radio and Television Co.*, 6 FCC 2d 768, 769, 9 RR 2d 595, 597 (1967). See also Davis, *Administrative Law Treatise*, Section 14.15 (1958).

[12] We also note that, since the testimony OBC elicited from the Industrial witnesses was not within the scope of the direct testimony, it was not a proper subject for cross-examination. See 6 Wigmore, Evidence, § 1885 (3rd ed. 1940). In our view, OBC should have subpoenaed the Industrial principals or otherwise called them for hearing as its own witnesses.

to observe the demeanor and credibility of the witnesses, or deponents, and therefore resulted in a denial of OBC's right to a full and fair hearing must be rejected. OBC did not question the veracity of the deponents and/or witnesses until oral argument before the Review Board and therefore the Presiding Judge had no opportunity to rule on this matter. Moreover, OBC's argument is completely devoid of any specific factual bases for questioning the veracity of any witness or deponent; there are no character qualifications issues in this proceeding; [13] and there is no conflicting or inconsistent testimony where observation of the witnesses might be an important factor in determining the facts. Finally, the Commission has held that "where the facts are otherwise clear and reliance upon demeanor is not essential to the decision . . . the demeanor factor should be employed with considerable restraint, if at all." *Carbon Emery Broadcasting Co.*, 22 FCC 584, 586, 12 RR 1268, 1268c (1957). See *Coastal Electronics Co.*, 42 FCC 2d 1032, 1039, 28 RR 2d 747, 754–5 (1973). *Cf. Harriman Broadcasting Co.* (*WXXL*), *supra.* In our opinion the facts of this case are "clear" and "reliance upon demeanor is not essential to the decision." Thus, even assuming, *arguendo*, that the Judge was in error, it was, at most, harmless error because all relevant evidence is in the record and no prejudice to either OBC's rights or the public interest has been shown. *Cf. Sisto* v. *CAB*, 86 U.S. App. D.C. 31, 179 F. 2d 47 (1949); *Mid-Florida Television Corp.*, 33 FCC 2d 1, 7, 23 RR 2d 521, 531 (1972), review denied 37 FCC 2d 559, 25 RR 2d 533, remanded on other grounds *sub nom. TV 9, Inc.* v. *FCC*, —— F. 2d ——, 29 RR 2d 963 (D.C. Cir. 1973).

8. Accordingly, IT IS ORDERED, That the motion to accept late filing, filed January 9, 1974, by Industrial Business Corporation, IS GRANTED, and the reply pleading IS ACCEPTED; and

9. IT IS FURTHER ORDERED, That the motion to reopen record, accept amendment, and reclose record, filed June 3, 1974, by Ogallala Broadcasting Company, Inc., IS GRANTED, and that the record IS REOPENED, that the amendment IS ACCEPTED, and that the record IS RECLOSED; and

10. IT IS FURTHER ORDERED, That the motion for postponement of oral argument, filed June 3, 1974, by Ogallala Broadcasting Company, Inc., IS DENIED; and

11. IT IS FURTHER ORDERED, That the application of Ogallala Broadcasting Company, Inc. (BPH–7364) for a new FM broadcast station at Ogallala, Nebraska, IS DENIED, and that the application of Industrial Business Corporation (BPH–7317) for the same facilities IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
DEE W. PINCOCK, *Member, Review Board.*

[13] Compare *Harriman Broadcasting Co.* (*WXXL*), FCC 67M–651, 9 RR 2d 1302, 1304, affirmed 8 FCC 2d 274, 10 RR 2d 1 (1967).

109–003—74——3

APPENDIX

RULINGS ON EXCEPTIONS OF OGALLALA BROADCASTING CO., INC.

Exception No.	*Ruling*
1	Granted to the limited extent that par. 6 of the initial decision is modified to reflect that OBC participated in the taking of evidentiary depositions despite its objections. But see par. 4–8 of this decision.
7	Denied. The judge did not abuse his discretion.
2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, 15, 16, 30.	Denied. See par. 4–7 of this decision.
12, 34, 46, 48, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 67, 70, 79, 83, 95.	Denied as being without decisional significance.
17, 18, 22[1], 23	Denied. The judge did not abuse his discretion in rejecting OBC exhibit No. 14. The information in the exhibit was not "rebuttal," but rather a part of OBC's affirmative case on economic dominance and should have been exchanged prior to hearing; nor is it directly related to the procedural irregularities occasioning the taking of posthearing depositions.
19, 20[1]	Denied. OBC's "request" was grossly untimely and was in violation of the judge's order (FCC 72M–1141, released Sept. 11, 1972) directing the parties "to exchange their proposed testimony in written form . . .". See par. 6 of this decision.
24, 25, 26	Denied. See pars. 11 and 12 of the Initial decision; and memorandum opinion and order, FCC 73M–27, released Jan. 10, 1973. The judge clearly drew a distinction between the basic and comparative aspects of the economic dominance question.
27, 29	Granted in part and denied in part. See par. 6 of this decision.
28	Denied for the reasons stated in the Review Board's memorandum opinion and order, 40 FCC 2d 69, 26 RR 2d 1447 (1973).
31	Denied. The judge's finding is accurate and adequate.
32	Denied. OBC was allowed to fully explore by cross-examination all matters it believed relevant to its case. See footnote 11 to this decision. *Cf. Chapman Radio and Television Co.*, 6 FCC 2d 768, 9 RR 2d 595 (1967).
33	Denied. See par. 6 of this decision.
35, 36, 37, 38, 39, 40, 41, 42, 43[2], 45[2], 47, 49, 50, 63, 64, 74, 81, 82.	Denied. The judge's findings and conclusions on the question of economic dominance by Industrial are amply supported by the record evidence. See par. 10–29 of the initial decision. With the exception of the "airport controvery" (see pars. 18–29 of the initial decision), OBC has not submitted any allegations that were not before the Board when it denied OBC's interlocutory request for a disqualifying "economic dominance" issue (40 FCC 2d 69, 26 RR 2d 1447 (1973)) and, even as a comparative matter, the Board does not believe that OBC is entitled to a preference. OBC's argument that industrial's principals dominate the community of Ogallala is founded on the undisputed fact that 9 of the Industrial's 13 principals are employees of or own interests in 2 of the community's major employers, Thompson Ramo Woolridge, Inc. (TRW) and Good-All Electric (Good-All). See pars. 13 and 14 of the initial decision. The facts

[1] There is no exception numbered 21.
[2] There is no exception numbered 44.

Exception No.	*Ruling*
	that TRW and Good-All are major employers in Ogallala and that they have a definite impact on the community and its affairs do not necessarily lead to the conclusion that the public interest would be adversely affected by a grant to Industrial. Compare *Hershey Broadcasting Co., Inc.*, FCC 62–232, 22 RR 1970, reconsideration denied 22 RR 1072 (1962). Neither TRW nor Good-All own interests in Industrial; and the connections between the Industrial stockholders and TRW and Good-All do not, by themselves, raise any adverse inference. More must be shown in order to warrant a comparative demerit, *The Travelers Broadcasting Service Corp.*, 21 FCC 110, 175, 192, 12 RR 689, 767, 789 (1956), and more was not shown in this case. The controversy over the airport, if anything, indicates that TRW and/or Good-All do not have the control over the lives of the community's citizens that OBC claims it has. Most significant is the fact that OBC's station KOGA and others were able to convince the voters to choose an airport site that was well known to be detrimental to the interests of TRW. Nor is there any evidence that TRW attempted to use its position to coerce its employees or other citizens. Also, as noted by Industrial, only about one-half of TRW's employees reside in Ogallala proper and the other employees live in a radius of approximately 50 miles. Finally, even if OBC were entitled to a preference on this matter, it would be slight, and certainly insufficient to outweigh the substantial preference to which Industrial is entitled under the criterion of diversification of mass media. See pars. 34–37 of the initial decision.
65	Denied. OBC's argument that the TRW newsletter should be considered as a medium of mass communications is patently absurd. First, TRW has no ownership interest in the Industrial application. Second, the newsletter and intercom have not been shown to be a part of the media of mass communications in Ogallala in that they do not "compete . . . for consumer time" with, for example, newspapers and radio and television stations. *Southland Television Co.*, 20 FCC 159, 164, 10 RR 751, 756 (1955). *Cf. Lorain Community Broadcasting Co.*, 14 FCC 2d 604, 14 RR 2d 155 (1968), affirmed *sub nom. Allied Broadcasting, Inc.* v. *FCC*, 140 U.S. App. D.C. 264, 435 F. 2d 68, 19 RR 2d 2071 (1970).
66	Granted. See par. 1 of this decision. However, this does not diminish the impact of Industrial's substantial preference under the diversification criterion. See *Terre Haute Broadcasting Corp.*, 25 FCC 2d 348, 19 RR 2d 487 (1970).
68, 69	Denied. The judge's findings are accurate and adequate. OBC's proposed additional findings would add nothing of decisional value.
71, 72, 78	Denied. The judge's findings are fully supported by the record. OBC's alleged plan to cease duplication sometime in the future is speculative and cannot be relied upon.
73, 75	Denied. It is clear that if OBC's application is granted, it will control the only two broadcast stations in the community of Ogallala. In such circumstances, the Commission has consistently emphasized its policy favoring a wide diversity of ownership of communications media, with a primary objective being the "*maximum diffusion of control* of the media of mass communications." *Policy*

Exception No.	*Ruling*
	Statement on Comparative Broadcasting Hearings, 1 FCC 2d 393, 394, 5 RR 2d 1901, 1908 (1965). (Emphasis supplied.) See *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 27 RR 2d 1379 (1973), review denied FCC 74–139, released Feb. 11, 1974; *Pleasant Broadcasting Co.*, 40 FCC 2d 582, 27 RR 2d 257 (1973); and *Snake River Valley Television, Inc.*, 26 FCC 2d 380 20 RR 2d 644 (1970), review denied FCC 71–549, released May 26, 1971. Moreover, it is clear that the availability of other media in Ogallala does not substantially lessen the degree of preference to be awarded here. Significantly, the initial decision in *Terre Haute*, 25 FCC 2d 356, 16 RR 2d 757 (1969), which is relied upon by OBC, was reversed by the Board 25 FCC 2d 348, 19 RR 2d 487, at least partially on the grounds that the judge in that case had failed to award a sufficient diversification preference to the applicant with no other media interests.
76	Denied. The judge's conclusion is supported by the record. OBC is entitled to a preference for integration, but because only 10 percent of the OBC ownership is involved, the preference must be slight. See *Policy Statement, supra.* 1 FCC 2d at 396, 5 RR 2d at 1909–1911.
77	Denied. The judge was correct in finding that there has been no adequate showing by OBC of an "unusually good" past broadcast record. In order to make such a finding, it is necessary that *all* aspects of the past record be shown, rather than only those aspects which the applicant believes will be to its benefit. Here, for example, nothing has been shown of KOGA's commercial practices and there has been no detailed program proposal submitted. Finally, the record does not support the conclusion that the public affairs percentages offered by OBC are "usually good". See *Terre Haute Broadcasting Corp., supra*, 25 FCC 2d at 352, 19 RR 2d at 492.
80	Denied. Experience and integration are irrelevant in considering efficient use of a frequency.
84, 85, 86	Denied. The judge's conclusions are amply supported by the record and case precedent. See *e.g., Terre Haute, supra; Pleasant Broadcasting Co., supra;* and *Snake River Valley Television, Inc., supra.*
87, 88, 89, 90, 91, 92, 93, 94.	Denied. The judge's rulings were not an abuse of his discretion.
1	Granted. The record shows that Richard A. Davidson is a 5 percent stockholder of Good-All Electric Co.
2	Denied as being without decisional significance.
3	Granted. The letter of credit in question does not support the judge's finding that a loan of $100,000 was available to OBC; however, it does not appear to be of decisional significance because at that time $40,000 was sufficient to meet OBC's estimated first-year costs and a loan in that amount was, and is, available.
4	Denied. The Board agrees with the judge, OBC, and the Broadcast Bureau that OBC is financially qualified. See pars. 32 and 33 of the initial decision. The information relied upon by Industrial to upset the judge's conclusion is not a part of the record in this proceeding and cannot be relied upon. *Cf. Deep South Broadcasting Co.* v. *FCC*, 120 U.S. App. D.C. 365, 347 F. 2d 459, 4 RR 2d 2018 (1965).
5	Denied. The judge's findings in par. 36 of the initial decision are accurate and adequate.
6	Denied. The judge made this conclusion at par. 40 of the initial decision.

FCC 73D–55

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of INDUSTRIAL BUSINESS CORP., OGALLALA, NEBR.	Docket No. 19559 File No. BPH–7317
OGALLALA BROADCASTING CO., INC., OGALLALA, NEBR.	Docket No. 19560 File No. BPH–7364
For Construction Permits	

APPEARANCES

John L. Tierney, on behalf of Industrial Business Corporation; *Richard Hildreth, Vincent J. Curtis, Jr.* and *M. Scott Johnson*, on behalf of Ogallala Broadcasting Company, Inc.; and *Michael T. Fitch*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FREDERICK W. DENNISTON

(Issued October 11, 1973; Released October 18, 1973)

PRELIMINARY STATEMENT

1. These mutually exclusive applications for construction permits authorizing FM Channel 228, at Ogallala, Nebraska, were designated for hearing by Order released August 2, 1972, FCC 72–667, in which the following issues were specified;

> 1. To determine with respect to the application of Industrial Business Corporation: (a) Whether a bank loan of $60,000 will be available to the applicant from The First National Bank, Ogallala, Nebraska; and (b) Whether, in light of the evidence adduced under the above issue, the applicant is financially qualified.
>
> 2. To determine with respect to the application of Ogallala Broadcasting Company, Inc.: (a) Whether a bank loan of $30,000 will be available to the applicant from the Keith County Bank and Trust Company, Ogallala, Nebraska; (b) Whether the applicant, in the event the availability of the $30,000 bank loan is established, has sufficient current and liquid assets in excess of current liabilities to meet the remaining funds required, or whether the applicant has available other sources of funds to meet its requirements; (c) Whether, in light of the evidence adduced under the above issues, the applicant is financially qualified.
>
> 3. To determine, on a comparative basis, which of the proposals would better serve the public interest.

4. To determine, in light of the evidence adduced under the above issues, which, if either, of the applications for construction permits should be granted.

2. Hearings were held on November 20, 21 and 22, 1972 in Washington, D.C. Depositions of a number of witnesses were taken in Ogallala, Nebraska, on February 7 and 8, 1973, pursuant to approval given by Order released January 10, 1973 (FCC 73M–27), and, at a further hearing session on May 31, 1973, those depositions and certain other evidence were received in evidence. The record was closed on the latter date.

3. By Order released September 12, 1973 (FCC 73M–1035), the record was reopened, an amendment tendered by Ogallala Broadcasting Company, Inc. was accepted, and the record again was closed.

4. It is also noted that a Petition filed by Ogallala Broadcasting Company, Inc., for the assignment of an additional FM channel to Ogallala, was denied by the Commission by Order released September 10, 1973, RM–1970, FCC 73–910.

PROCEDURAL QUESTIONS

5. Ogallala Broadcasting Company, Inc. (OBC), which is the licensee of AM Station KOGA, Ogallala, contends that by reason of the provision for and acceptance of depositions as previously noted, error has been committed which deprived OBC from fully developing the record and from having a full hearing.

6. The reasons for allowing the taking of depositions are set forth in the Order released January 10, 1973 (FCC 73M–27) and, subsequently, by Order released January 23, 1973 (FCC 73M–96), permission to OBC to appeal that Order was denied. While originally contending the taking of depositions would deprive it of the right of cross-examination, OBC did in fact participate in the deposition sessions and examined the Industrial Business Corporation (Industrial) witnesses at length in connection with OBC's economic dominance theory, hereafter discussed. OBC does not indicate in what manner it has been deprived of the opportunity of developing a record or of having a full hearing, other than to contend that the Presiding Judge had no opportunity to observe the demeanor of the witnesses giving depositions. There is nothing in the depositions to suggest demeanor to be a factor, nor is any referred to by OBC.

7. OBC suggests that demeanor observations were required as "counsel for Industrial fought any exposure of facts and information with respect to the principals of Industrial and the discovery depositions made it clear that Industrial had no intention to be the least bit cooperative." This allegation is not supported by the record and is unwarranted.

8. Accordingly, the prior ruling admitting the depositions (Tr. 376) is reaffirmed.

9. A second procedural point is presented with respect to OBC Exhibit 14, which was rejected by the Presiding Officer (Tr. 388). Under the heading "Statement of Position" in its Proposed Findings, OBC refers parenthetically to the fact that its "rebuttal was not

permitted to be introduced" (par. 3). OBC does not otherwise except to the evidentiary exclusion, and accordingly, it may be considered as abandoned. It should be noted, however, that counsel for OBC was warned at the hearing conference May 11, 1973, the forthcoming hearing was to be for a limited purpose and that if he intended anything beyond that he should make a specific request (Tr. 337); the Order released May 14, 1973 (FCC 73M–570) specifically limited the purpose of the May 31, 1973 hearing, and OBC did not seek to enlarge it. Moreover, the matter presented by Exhibit 14 is "rebuttal" to testimony which OBC itself elicited from Industrial witnesses at the deposition session. The ruling excluding OBC Exhibit No. 14 is affirmed.

ECONOMIC DOMINANCE

10. Because it permeates much of this proceeding, consideration will first be given to the contention by OBC that the principals of Industrial exercise economic dominance in Ogallala such that the Industrial application should be denied, citing *Midland Brodacasting Co.*, 12 F.C.C. 611; *The Travelers Broadcasting Service Corp.*, 21 F.C.C. 110; and *Hershey Broadcasting Company, Inc.*, 44 F.C.C. 2800.

11. By Motion filed October 26, 1972, OBC sought the enlargement of issues herein to include an economic dominance issue against Industrial, but this was later denied by Order released March 14, 1973, FCC 73R–109. At the prehearing conference, counsel for OBC refused to agree to a written submission and notwithstanding the order herein requiring written submissions, OBC exchanged no testimony or exhibits on the economic dominance theory although it subsequently offered, or sought to offer, considerable documentary evidence. At the hearing, however, OBC sought to cross-examine Industrial witnesses beyond the scope of their direct testimony which dealt only with media interests and financial aspects, by inquiries related to the OBC economic dominance theory. By oral ruling (Tr. 151), the Presiding Judge ruled that that issue could properly be explored under the standard comparative issue pursuant to *Kentucky Central Television, Inc.*, 4 F.C.C. 2d 227, 230. Thereupon, OBC counsel examined each Industrial witness that appeared at the hearing or at the later deposition session notwithstanding objection of Industrial counsel that such testimony was beyond the scope of the direct testimony. Such objections were overruled and the witnesses testified freely. The allegations running throughout the Proposed Fndings of OBC that state or imply that Industrial has concealed or withheld information are wholly unwarranted.

12. As OBC alleges that economic dominance by Industrial's principals exists, a burden rests upon OBC to demonstrate this and its relation to the comparative evaluation. It has wholly failed to do so, having offered no testimony which even suggests this possibility. Accordingly, a finding is justified that no economic dominance by Industrial or its principals has been shown. However, for the benefit of reviewing authority, such evidence as emerges, and which is limited almost wholly to the "Airport Issue," will be reviewed.

13. Industrial has 13 stockholders each of whom holds either 7.31% or 9.76% of its stock. Five of the 7.31% owners are employees of the Capacitor Division of Thompson Ramo Woolridge, Inc. (TRW), as follows:

Jimmie J. Jensen, Vice President, General Manager
Jerome F. Gosda, Operations Manager
Richard F. Villm, Assistant Division Manager
Loren Kolste, Division Manager
Kenneth A. Hagge, Assistant Division Manager

Of these, only Gosda and Kolste own extremely small holdings of stock in TRW, and one, Jensen, is an officer (Vice President of its Electronics Group); none are directors of that corporation.

14. Four of the Industrial stockholders own interests in Good-All Electric, as follows:

Willard Soper, President, Director and 50% Stockholder
Richard A. Davidson, Assistant Treasurer, Controller and 50% Stockholder
William A. Morrell, Secretary, Director, 10% Stockholder, Materials and Production Manager
Donald F. McGinley, Director and 1.2% Stockholder

In addition, three of Industrial's principals are officers or directors of a local motel, and two are officers and directors of a local nursing home.

15. In addition, Industrial stockholders held or have held numerous community posts as follows:

Ira Humphreys—Chairman of the Ogallala Airport Authority and a Member of the City Council
Frank Kersenbrock—Vice Chairman of the Ogallala Airport Authority, a President of the Ogallala Civic Improvement Association, and a Member of the School Board
Jerome Gosda—Secretary-Treasurer of the Ogallala Airport Authority
William Morrell—Finance Officer, Ogallala Airport Authority
William Soper—Member of Ogallala Airport Authority, City Councilman
Russell Van Every—Mayor, City Councilman, President, Secretary and Director of Ogallala Civic Improvement Association

16. Of the various Ogallala Boards and Commissions, Donald F. McGinley of Industrial is a member of the Library Board, Loren Kolste is a School Board member; and Kenneth Hagge, Chairman, Hospital Board.

17. The 1970 population of Ogallala was 4,976 and of Keith County, in which it is located, 8,487. The annual average 1971 employment in Keith County was 3,435, of which "manufacturing" represented 1,033. Of that category, TRW had 925 employees and Good-All Electric had 50 (which had declined to 41 by February 1973). Thus, these two concerns represent about 95% of the manufacturing employment and about 30% of all employment in Keith County.

THE AIRPORT ISSUE

18. Beginning about 1966, and through 1970, a controversy raged in Ogallala with respect to the development of a municipal airport. The only facility then available was a private grass landing strip known as Searle Field at which service was curtailed in 1967. Prior thereto, the Department of Aeronautics of the State of Nebraska, by letter dated June 10, 1966, advised the Mayor of Ogallala that the existing facility (Searle Field) required an increase in the runway of at least 5,000 feet and that the area around Searle would not permit such expansion.

19. The ensuing controversy was over whether the Searle site or another should be developed. TRW and others advocated a site which could accommodate commercial aviation. Its own needs for employee travel, air freight, and its corporate jet had to be met at North Platte, approximately 50 miles away. Moreover, an accident at Searle Field had nearly "wiped out" three of its employees. Siding with TRW were individuals and the *Keith County News*, a local semiweekly newspaper.

20. Opposing a change of site were individuals, the owner of Searle Field, the local Air Pilots Association, Radio Station KOGA, including its banker, Mel Adams, and Richard Dudden, its attorney, both of whom were members of the Pilots Association. Ultimately, after considerable ambivalence by the citizens of Ogallala and public authorities, the proponents of Searle Field won in the dispute and a field was developed incapable of receiving full commercial service or of receiving corporate jets. Nevertheless, OBC, the winner in the dispute, clings to its contention that Industrial and/or TRW/Good-All exercise economic dominance in the area.

21. When the service at Searle Field was curtailed in 1967, the city leased the field and created an Airport Authority to operate it. Willard Soper and Ira Humphreys, now Industrial principals, were among the five appointed to the Authority by the Mayor. They were advised by the Mayor that the Council favored the Searle site and that State funds were available for its development. Notwithstanding the latter statement and in the light of the 1966 letter from the Department of Aeronautics, all members were of the view other sites should be investigated. After tentative selection of one of two "North" sites, local opposition and questions as to fog conditions led to selection of a "South" site.

22. After an election in April 1968, Mel Adams, KOGA's banker, was elected to the Authority in place of Soper, and thereafter all members except Humphreys changed their position and backed Searle Field. When the Authority proposed in May 1969 an additional tax to finance the acquisition and improvement of Searle Field, however, the City Council refused to approve it sending the question rather to referendum where the electorate defeated it. Thereupon, Adams and three other members of the Authority resigned and Gosda, Kersenbrock and Morrell, now Industrial principals, were appointed to their vacancies.

23. The new Authority continued to study new sites. An engineering study was obtained for the South site and this was compared with the studies of the so-called North site and of Searle Field.

24. The Authority then met with the Nebraska Department of Aeronautics and received approval of the South site although funds were not then available. However, KOGA, Mr. Searle and the Pilots Association renewed their opposition. Thereafter, FAA refused approval of the site because of conflicting air patterns that would be engendered with other fields including Searle.

25. In the spring of 1970, another election for positions on the Airport Authority was held. There were two slates with clear-cut positions; one in favor of the South site, the other backing Searle Field. All of the Searle Field candidates were elected; Searle Field was ultimately developed as the municipal airport.

26. The activities of TRW with respect to this matter consisted of a letter of June 11, 1968 to the Airport Authority by Kolste, Division Manager, stressing the importance to TRW of commercial air service. Data were supplied as to the extensive travel by TRW employees, requiring automobile transfer to or from North Platte or Denver with the attendant inconvenience and cost. Again, on June 6, 1969, by a newsletter distributed in its plant, in anticipation of the June 11, 1969 election involving the special tax, TRW advised that it was interested only in commercial service, and could reduce operating costs if air service were available in Ogallala instead of North Platte, and that it was opposed to Searle Field. On November 5, 1969, Kolste, Division Manager, addressed a letter to the FAA Kansas City office, replying to an invitation to interested parties to submit comments with respect to the Ogallala Airport proposal, which supported the then pending South site, as being a definite aid to the overall development and growth of the area and the future growth of TRW.

27. Finally in a 1969 year-end newsletter made available to employees, dated January 7, 1970, signed by six TRW officials, including Hagge, Kolste and Villm, TRW referred to its support of the South site and enumerated advantages of that site.

28. Throughout the controversy, TRW carried KOGA on the plant public address system, although that station consistently advocated an opposing view. None of the TRW employees who served on the Airport Authority were instructed by TRW as to their position and each arrived independently at his own position.

29. As there is no specific issue in this proceeding as to economic dominance, specific findings and conclusions are unnecessary. Suffice it to say that the issue has been explored and OBC has failed to establish any economic dominance, either actual or potential, on the part of Industrial principals, or their employers.

Findings of Fact

Issue 1—Financial Issue—Industrial Business Corporation

30.(a) *Availability of Bank Loan.* To meet its requirements of $71,873.00 to construct and operate for one year, Industrial has avail-

able $2,957.00, stock subscriptions of $13,000.00 and a bank loan of $60,000.00. The loan would be made by The First National Bank of Ogallala and would be based on the guarantees of the Industrial stockholders, which it already has.

31. (b) Industrial is financially qualified to construct and operate its proposed station.

ISSUE 2—FINANCIAL ISSUE—OGALLALA BROADCASTING COMPANY, INC.

32. (a) and (b) *Availability of Bank Loan.* OBC will require $39,568.00 to construct and operate its proposed station. To meet this requirement, it has sufficient assets to provide the $9,568.00 needed over and above a $30,000.00 bank loan. That loan will be made by the Keith County Bank and Trust Company of Ogallala. That bank will lend up to $100,000.00, nd its commitment is good until May 24, 1974.

33. (c) Ogallala Broadcasting Company, Inc. is accordingly financially qualified to build and construct its proposed station.

ISSUE 3—COMPARATIVE EVALUATION

34. *Diversification of Control of Mass Media.* None of the 13 stockholders of Industrial has any interest in any other media of mass communication. Neither do their immediate families own media interests except that the wife of one, Ira Humphreys, a 7.31% stockholder of Industrial, owns 100 shares of Scripps-Howard Broadcasting Company, representing a .003% interest in that concern.

35. OBC, on the other hand, owns and operates the only radio station in Ogallala, KOGA.

36. There is no daily newspaper in Ogallala, the *Keith County News* published locally, being a biweekly. There is also a lack of other media of local origination. There is no primary radio service at Ogallala as defined by the Commission except KOGA, only one educational TV station at Sutherland (North Platte) providing Grade A coverage and two TV stations (North Platte and Hays Center) providing Grade B coverage. TV service to Ogallala is primarily by cable from distant stations.

37. The substantial preference under this criterion for the Industrial proposal is accordingly greatly enhanced, particularly since OBC will duplicate its existing KOGA programming, which represents the only substantial local voice.

38. *Integration of Ownership.* Of Industrial's 13 principals, of which 12 are local residents with substantial participation in its civic affairs, none will devote full time to the management of the station and accordingly Industrial is entitled to no credit under this standard. *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393. OBC, on the other hand, will have its proposed station under the full-time management of Ray H. Lockhart, the General Manager of KOGA, its present AM station. While Mr. Lockhart is but a 10% stockholder, he is a Vice President and Director of the corporation. Both Lockhart and E. C. Robacker, a 48% stockholder, are residents of Ogallala with a record of civic participation. While

full-time participation is limited to a 10% stock ownership, OBC is nevertheless entitled to a credit under this standard.

39. *Past Broadcast Record.* KOGA won awards from the Knights of AK–SAR–BEN for which it applied, in 1968 and 1970, and has been commended from time to time for coverage of specific events. While indicating satisfactory past performance, it falls short of indicating an unusually good performance justifying credit under the past broadcast criteria; it clearly does not indicate an unusually poor record.

40. *Efficient Use of Frequency.* The fact of complete duplication of KOGA programming during its daytime hours militates strongly against the OBC proposal. The virtual monopoly on local news media now enjoyed by OBC would be perpetuated by a grant of its application. OBC offers nothing to indicate any economies or efficiencies which might be achieved if it were awarded the second aural station license in Ogallala.

41. OBC sought to have a specific issue added concerning its "economic dominance" contention. In denying that petition, the Review Board pointed out that it contains "neither specific allegations of fact nor affidavits by persons having knowledge thereof" as required by the rules (FCC 73R–109, released March 14, 1973). Having been afforded an opportunity to explore the subject as part of the comparative issue, OBC still did not come forward with facts or testimony of any witness who contended that economic dominance exists. OBC contended itself, rather, with examination of Industrial witnesses. From this, it seeks to draw, on brief, a series of assumptions that TRW-Good-All Electric, or the principals of Industrial, have made "thinly veiled economic threats"; that Kersenbrock, Morrell and Gosda who were appointed to the Airport Authority "committed themselves to comply with the TRW desires"; and that "Industrial has obviously contemplated having its station piped into the TRW plant". The quoted statements are wholly unsupported by the record and the evidence indicates the opposite to be true.

42. The statements and newsletters of TRW referred to are legitimate statements of position on a matter of importance to it, i.e. seeing the development of a nearby airport rather than having to obtain service fifty miles away. Those employees of TRW who served on the Airport Authority received no instructions from the company, and the fact that their positions coincided with that of TRW is not surprising since the traveling employees of the company are faced with considerable inconvenience by having to shuttle by car to and from North Platte and Denver.

43. If anything, the airport dispute demonstrated the success and dominance of KOGA as the sole local daily media as its views ultimately prevailed. Its draconian pursuit in this proceeding of an issue dead for three years [and which it describes as a "battle" with the local biweekly newspaper and others of the same viewpoint] suggests an intolerance of opposing viewpoints, which underscores the desirability of a second aural outlet in Ogallala.

44. Based on the foregoing, it is clear that the Industrial credit for diversification of control of mass media greatly overshallows the

credit of OBC for integration of 10% of its ownership into management. Moreover, the Industrial proposal will bring to Ogallala a much needed second aural service in contrast with the OBC proposal to primarily duplicate its existing KOGA programming. It must be concluded, therefore, that the best practicable service to the public would result from a second aural local expression.

Conclusion

(ISSUE)

45. For the reason above stated, it is concluded that the public interest would best be served by a grant of the Industrial application.

Accordingly, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the application of Industrial Business Corporation (File No. BPH–7317) is GRANTED and the application of Ogallala Broadcasting Company, Inc. (File No. BPH–7364) is DENIED.

Federal Communication Commission,
Frederick W. Denniston, *Administrative Law Judge.*

FCC 74-732

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	CSC-66 MI008, CSC-66A MI004, CSC-67 MI007, CSC-67A MI005, CSC-67B MI011, CSC-67C MI012, CSC-67D MI003, CSC-67E MI009
IRON RANGE CABLE TV, MARQUETTE, HARVEY, ISHPEMING, ISHPEMING TOWNSHIP, NEGAUNEE, PALMER, ELY TOWNSHIP, AND NATIONAL MINES, MICH.	
Request for Order To Show Cause	

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1974; Released July 11, 1974)

BY THE COMMISSION.

1. On October 12, 1973, WLUC, Inc., licensee of Station WLUC-TV, Marquette, Michigan, filed two "Petition[s] of WLUC, Inc., for Issuance of an Order to Show Cause" against Iron Range Cable TV, operator of cable television systems at the above-captioned communities for allegedly commencing full-time carriage during August, 1973, of Station WBAY-TV, Green Bay, Wisconsin, in violation of Section 76.11(a) of the Commission's Rules.[1] On November 12, 1973, Iron Range filed two "Opposition[s] to Petition[s]," and on November 13, 1973, Norbertine Fathers, licensee of Station WBAY-TV filed "Comments" in support of Iron Range. On December 3, 1973, WLUC filed its Reply. In addition, on December 28, 1973, Iron Range filed a "Statement" in response to WLUC's Reply.

2. Iron Range serves Ishpeming, Ishpeming Township, Negaunee, Palmer, Ely Township and National Mines from one headend, and Marquette as well as Harvey from a second headend. Each system has a twelve channel capacity and carries the following television signals:

WLUC-TV (CBS, Channel 6) Marquette, Michigan
WBAY-TV (CBS, Channel 2) Green Bay, Wisconsin
WJMN-TV, (NBC, Channel 3) Escanaba, Michigan
WLUK-TV (ABC, Channel 11) Green Bay, Wisconsin
WKBD-TV (Ind., Channel 50) Detroit, Michigan
WNPB (Educ., Channel 13) Marquette, Michigan

[1] Section 76.11(a) of the Rules states: "No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission."

The National Mines system has fewer than 50 subscribers and thus is not subject to our cable television rules.[2] Iron Range's other systems commenced operations prior to March 31, 1972. Section 76.65 permits a system to continue carriage of any signal lawfully carried or authorized before that date.[3] It is undisputed that Iron Range carried WBAY–TV's signal on all its systems except National Mines before July 1, 1965.

3. WLUC argues that because Iron Range did not carry WBAY–TV from July 1, 1965 to January, 1969, it forfeited its right to carry WBAY–TV as a grandfathered signal. Iron Range's asserted failure to carry the signal is based on an affidavit of April 12, 1971, by Mr. Lou Chappell, a former General Manager of WLUC–TV and an Iron Range subscriber. WLUC also submitted an Iron Range letter of notification pursuant to former Section 74.1105[4] dated August 1, 1969, and a WLUC questionnaire completed by Iron Range on March 14, 1967. Both documents purport to list Iron Range signal carriage, but neither contains any indication that Iron Range carried WBAY–TV.

4. Iron Range states that its common carrier's limited channel capacity required it to suspend full-time carriage of WBAY–TV during the disputed period. It claims that its systems continued to carry the signal on a part-time, switched basis until August, 1973, when it reinstituted full-time carriage. Iron Range argues that the common carrier's inability to provide full-time carriage was a circumstance beyond its control and thus insufficient to require deletion of the signal. See *Midwest Video Corporation*, FCC 73–377, 40 FCC 2d 441. Iron Range has submitted sworn statements as well as correspondence to show that it never abandoned carriage of WBAY–TV. We reject WLUC's arguments for the following reasons:

In a similar case, *Satellite Systems Corporation*, FCC 73–145, 39 FCC 2d 614, we upheld the grandfather rights of a system contiguous to the Iron Range systems and formerly owned by Iron Range; we so held, even though this system too had afforded only part-time carriage to WBAY–TV from July 1, 1965 to January, 1969. We stated that "[a]lthough there appears to be some dispute as to the specific periods during which the signal of WBAY–TV has been carried, there appears to be no dispute that the signal was being carried on a daily switched basis on and before March 31, 1972 and that such carriage is authorized." Despite this language and its participation in that proceeding, WLUC–TV has failed to address Iron Range's assertion of

[2] Section 76.5(a) of the Rules states: "*Cable television system* (*or CATV system*). Any facility that, in or in part, receives directly, or indirectly over the air, and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or by cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility that serves fewer than 50 subscribers. . . ."

[3] Section 76.65 of the Rules states in pertinent part: "The provisions of §§ 76.57, 76.59, 76.61, and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a cable system was authorized to carry or was lawfully carrying prior to March 31, 1972. . . ."

[4] Former Section 74.1105 of the Rules states in pertinent part: "(b) The notice shall include the name and address of the system identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence."

part-time carriage, and has confined its showing to documents indicating that Iron Range did not regularly carry WBAY–TV.

In view of the foregoing, the Commission finds that issuance of the requested Order to Show Cause would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition[s] of WLUC, Inc. for Issuance of Show Cause Order" filed October 12, 1973, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R–259

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
KOWL, INC., SOUTH LAKE TAHOE, CALIF.	Docket No. 19978 File No. BPH–8055
NEW WORLD BROADCASTING CO., SOUTH LAKE TAHOE, CALIF.	Docket No. 19979 File No. BPH–8077
ENTERTAINMENT ENTERPRISES, INC., SOUTH LAKE TAHOE, CALIF.	Docket No. 19980 File No. BPH–8117
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted July 16, 1974; Released July 19, 1974)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. The above-captioned mutually exclusive applications were designated for hearing by Memorandum Opinion and Order, 39 FR 12846, published April 8, 1974. Now before the Review Board is a petition to enlarge issues, filed April 23, 1974, by New World Broadcasting Company (hereinafter New World) requesting *Suburban* issues against KOWL, Inc. (hereinafter KOWL) and Entertainment Enterprises, Inc. (hereinafter EEI).[1]

2. *Requested Suburban issue against KOWL*, New World alleges that KOWL's *Suburban* showing is deficient in at least three significant respects: (a) KOWL has failed to list significant groups in the area proposed to be served; (b) the applicant has failed to demonstrate that it selected a random sample in conducting its survey of the general public; and (c) KOWL has failed to list the anticipated time segment, duration and frequency of broadcast of its proposed program schedule, and what proposed programming will deal with specific needs. As an underlying proposition in raising the above deficiencies, New World maintains that KOWL may not rely on the *Suburban* community survey which accompanied its renewal application for standard broadcast station KOWL, filed September 2, 1971.[2] The Board is in agreement with the Bureau that KOWL basically relies on the community profile submitted with its renewal application and this information, based on the 1970 Census and a study compiled by the Department of Economic Development, appears to remain a valid overview of the South Lake Tahoe area. Moreover, the Board is of the view that KOWL can rely on its community survey submitted with its renewal

[1] Also before the Board are the following related pleadings: (a) opposition, filed June 12, 1974, by KOWL; (b) opposition, filed June 12, 1974, by EEI; and (c) comments, filed June 12, 1974, by the Broadcast Bureau.

[2] In the FM application under consideration here, filed August 23, 1971, KOWL stated that there had been no change in the problems or substance of its prior ascertainment effort and therefore no ascertainment survey was being filed with the FM application.

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application. Question and Answer 2 to the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971), states that "prior filings within the year previous to the tender of the present application will generally be acceptable" and the Report & Order to the *Primer* states that the information can be no older than 18 months. KOWL's renewal application was filed on September 2, 1971 and a sample sheet of the community leader survey is dated March 4, 1971, 6 months prior to the filing date. KOWL's FM application was tendered August 23, 1971, within one year of the prior filing, and the prior survey appears to be no older than 18 months from the time the FM application was filed. Although the Board is of the view that KOWL's amendment to its survey, filed September 18, 1973, cures most of the deficiencies alleged by petitioner, our evaluation, discussed below, does take into account some of the information submitted in KOWL's renewal application.

3. The Board will deny New World's request for a *Suburban* issue against KOWL. First, although the applicant did not separately list the specific organizations within each significant group, there is no requirement that this be done,[3] and we are of the view that the demographic material submitted with KOWL's renewal application, coupled with the community leaders interviews from the various organizations represented in KOWL's amended survey, reflect compliance with the *Primer's* requirement that the applicant contact leaders from the significant groups in its service community.[4] See *Belo Broadcasting Corp.*, 42 FCC 2d 1011, 28 RR 2d 732 (1973), reconsideration granted in part, 44 FCC 2d 707, 29 RR 2d 323 (1974). In the absence by petitioner of a specific and adequately supported allegation that a significant group has been omitted (*Primer*, Q. & A. 10), the Board cannot find that KOWL has failed to comply with the requirements of the *Primer* as set forth in Q. & A. 9 and 10. We are also of the view that New World has, contrary to petitioner's allegations, revealed its methodology for conducting its general public survey. In its amended survey, the applicant points out that "110 members of the general public in the area were surveyed; selection of the survey group was made at random using" local telephone directories. We agree with the Bureau that this methodology comports with the requirements set forth in the Commission's Report and Order adopting the *Primer*, Q. & A. 13(b). Also see *Belo Broadcasting Corp.*, *supra*. Finally, New World's allegation that KOWL failed to set forth the specific information regarding its proposed programming (*Primer*, Q. & A. 29) is without merit and again reflects a failure by petitioner to take into account KOWL's amended survey. As noted by the Bureau, KOWL's proposed programming, as amended, does comply with the requirements of the *Primer* (*i.e.*, description, anticipated time segment, duration and frequency of broadcast of program or program series, and com-

[3] This point is illustrated in the Report adopting the *Primer* where the Commission points out that "if an applicant finds that there are ten labor unions in the community, the 'group' we consider significant is that of unions generally, and each union is not considered a separate group."

[4] In its demographic exhibits, KOWL states that legalized gambling is a main attraction in Lake Tahoe. Although a representative leader from that industry was not interviewed in its amended survey, the Vice President and General Manager of Harvey's Casino was interviewed in connection with the 1971 renewal application. With regard to racial and ethnic groups, the applicant has specifically noted the absence of any particular racial or ethnic community and this appears to be supported by the 1970 Census data.

munity problems to be treated). In light of the above, the Board will deny the requested *Suburban* issue against KOWL.

4. *Requested Suburban Issue against EEI.* New World maintains that although EEI lists several general categories of significant groups in its community, it fails to specify the name of any one of them and therefore the Commission has no basis for determining whether the applicant contacted community leaders representing those significant organizations. Since New World has failed to specify what significant group has been omitted, however, the Board finds that, standing alone, this allegation is insufficient to warrant the addition of a *Suburban* issue. Also see our discussion at paragraph 3, *supra.* New World also maintains, however, that of the significant groups listed by EEI, EEI failed to contact any leader(s) from a labor organization, women's group, charitable organization or educational institution. We agree with EEI that the chairman of the American Cancer Society represented a leader of a charitable organization and that the principal of a high school represented consultation with a member of an educational institution. However, it appears that no member of a women's group [5] was contacted and we question whether the president of a local firemen's association is a *bona fide* representative of a labor organization. In addition, we agree with petitioner that EEI has failed to specify in its proposed programming either the particular needs which the program is intended to serve [6] and/or the specific frequency and time segment as required by the *Primer*, Q. & A. 29. In light of the above deficiencies, the Board will add a limited *Suburban* issue against EEI.[7]

5. Accordingly, IT IS ORDERED, That the petition to enlarge issues filed on April 23, 1974, by New World Broadcasting Company, IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

6. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issue: To determine, with respect to the application of Entertainment Enterprises, Inc., (a) whether the applicant has interviewed community leaders representing the significant groups listed in its community survey; (b) whether the means proposed by the applicant to meet ascertained problems complies with Commission requirements; or (c) whether, in light of the evidence adduced pursuant to (a) and (b), the applicant has complied with the Commission's requirements to ascertain community problems and propose programming to meet those problems.

7. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to the issue specified herein SHALL BE on Entertainment Enterprises, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[5] EEI maintains that "no such organization has as yet developed to the same degree of widespread community involvement as other organizations contacted."

[6] See *Middle Georgia Broadcasting Co.*, 30 FCC 2d 796, 22 RR 2d 524 (1971).

[7] With respect to EEI's survey of the general public, the Board agrees with the Bureau that since EEI utilized the local telephone directory in conducting a random sampling of the general public (see Report & Order adopting the *Primer*, Q. & A. 13(b)), the applicant's additional method of conducting interviews at two local shopping centers does not render the survey deficient. Moreover, EEI states in its opposition that only twelve of the sixty-two interviews of members of the general public were conducted at the shopping centers.

FCC 74-685

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KTVO, INC. (KTVO-TV), KIRKSVILLE, MO. For Construction Permit	Docket No. 20100 File No. BPCT-4669

MEMORANDUM OPINION AND ORDER

(Adopted June 26, 1974; Released July 10, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration (a) the above-captioned application of KTVO, Inc., licensee of commercial television broadcast station KTVO, channel 3, Kirksville, Missouri-Ottumwa, Iowa;[1] and (b) a petition to deny and related pleadings filed in this proceeding.[2]

2. Television broadcast station KTVO, channel 3, Kirksville, Missouri-Ottumwa, Iowa, is authorized to operate with effective radiated visual power of 100 kW from an antenna height above average terrain of 1,080 feet at a transmitter site located near Lancaster, Missouri, 25 miles north of Kirksville, Missouri. The present controversy arises from the request of KTVO to relocate its transmitter to a site about 38 miles east of Kirksville, Missouri; to relocate its main studio to a site on U.S. Highway 63, 1.8 miles north of Kirksville, Missouri; to increase its antenna height to 1,981.2 feet above average terrain; and to increase its aural effective radiated power to 15 kW. KTVO places a city-grade signal over Kirksville, Missouri, and a predicted Grade A signal over Ottumwa, Iowa. Operating as proposed, station KTVO would for the first time place a city-grade signal over Quincy, Illinois, and a predicted Grade B signal over the Missouri communities of Hannibal, Moberly, Mexico, and Centralia. KTVO's Grade B signal would also penetrate within 4.5 miles of Columbia, Missouri. A petition to deny has been filed by Channel Seventeen, Inc., licensee of television broadcast station KCBJ-TV, channel 17 (UHF), Columbia, Missouri.

3. KCBJ-TV claims standing in this proceeding as a "party in interest" within the meaning of section 309(d)(1) of the Communications Act of 1934, as amended, on the basis that grant of the application would cause serious economic injury and serious impact on its ability to continue operations as a fledgling UHF television station. We find that petitioner has standing.

[1] KTVO is licensed to Kirksville, Missouri, and is authorized to identify as a Kirksville-Ottumwa station.

[2] The related pleadings are: Opposition to Petition to Deny filed December 18, 1973, by KTVO; and Reply to Opposition to Petition to Deny filed January 10, 1974, by KCBJ-TV.

4. The applicant alleges that grant of the application will permit a substantially more efficient and effective use of the Kirksville television channel assignment. KTVO alludes to the Commission's policy of encouraging VHF stations to provide the best possible service to the largest number of people. It is contended that the population within the proposed Grade B contour of KTVO is approximately 690,000 people, or about 47 percent larger than the population of approximately 465,000 people within the present Grade B contour of KTVO. It is further contended that KTVO's proposed Grade B signal would extend ABC network programming to 114,000 people located toward the southeast and beyond KTVO's present Grade B contour, people to whom no other Grade B level ABC programming is available. KTVO admits that its proposed changes would produce a Grade B signal that would overlap the Grade B contour of petitioner (KCBJ–TV), but alleges that the overlapped area contains only 75,000 people, or 19 percent of the total population of approximately 495,000 people within KCBJ–TV's Grade B contour.

5. Petitioner, KCBJ–TV, alleges that grant of the application would have an adverse impact on UHF television broadcasting in Columbia, Missouri, and adjoining communities.[3] Petitioner contends that KTVO does not presently serve Columbia, Missouri, its Grade B signal falls 40 miles north of Columbia. Under KTVO's proposed changes, KTVO's new coverage would invade the northeast portion of KCBJ–TV's present coverage area. A great number of Missouri counties and cities would be covered for the first time by KTVO, including the cities of Moberly (population—12,988), Mexico (population—11,807), and Centralia (population—3,618). KTVO's proposed Grade B signal would penetrate to within 4.5 miles of Columbia, Missouri, KCBJ–TV's principal city, and overlap a significant portion of KCBJ–TV's city-grade signal. Of the 18 counties presently served by KCBJ–TV with a population of approximately 382,000 persons, six of these counties, containing 42 percent of KCBJ–TV's present service area (159,000 persons), would be reached by KTVO's proposed signal. Petitioner finally alleges that the new market into which KTVO seeks to place its signal is already served by CBS affiliate KHQA–TV, channel 7, Hannibal-Quincy, Illinois. Though applicant is primarily an ABC affiliate, applicant does broadcast some CBS programming and would duplicate some of the programming presently being received by the market.

6. After careful review of the various pleadings filed herein, we believe that the petitioner has raised a substantial and material question of fact as to whether or not the applicant's proposed changes will adversely affect authorized and prospective UHF television broadcast stations in Columbia, Missouri, and adjoining communities. Petitioner is a comparatively new UHF station, having commenced operations on channel 17 in December 1971. As alleged in the pleadings,

[3] KCBJ–TV also alleges that the proposed changes would result in short spacing with co-channel WCIA, channel 3, Champaign, Illinois, located 181.69 miles from KTVO. This claim is erroneous as WCIA is located in Zone I and section 73.610(b) (1) and (2) of the Commission's rules requires a separation of only 170 miles between co-channel stations when one of the stations is located in Zone I.

and confirmed by the Commission's records, petitioner is losing money in an effort to make KCBJ–TV a viable operation. Petitioner presently competes with two commercial VHF television broadcast stations, KOMU–TV, channel 8, in Columbia, and KMOS–TV, channel 13, in Jefferson City, Missouri. Operating as proposed, KTVO's Grade B signal would for the first time overlap 24 percent of petitioner's Grade B contour, would penetrate within 4.5 miles of Columbia, petitioner's city of license, and overlap a portion of petitioner's city-grade signal. It should be noted that both the applicant and petitioner are ABC television network affiliates. It appears that the addition of another VHF signal in the Columbia, Missouri, market would have some effect on the petitioner, especially in view of the fact that the VHF station is an ABC affiliate. The extent of this effect can only be determined by an evidentiary hearing.

7. We believe that under these circumstances, it is necessary to explore in an evidentiary hearing whether the proposed operations of KTVO would have an adverse impact upon the development of UHF television broadcasting in the proposed service area. While the Commission encourages television broadcast stations to operate with maximum facilities in order to make the most efficient use of channel assignments and provide the best possible service to the largest number of persons, we have also expressed our concern with fostering the development of UHF broadcasting. *Gala Broadcasting Company*, 13 RR 2d 105 (1968); *WLCY–TV, Inc.*, 38 F.C.C. 2d 86 (1972). By the hearing ordered herein, a full record will be established which will form a basis for determining the choice between these policies. The burden of proceeding with the introduction of evidence with respect to the UHF impact issue will be placed on the petitioner, and the burden of proof with respect to this issue will be placed on the applicant.

8. We have carefully considered all of the matters raised in the various pleadings and, except as indicated by the issues specified below, we find that the applicant is qualified to construct and operate as proposed and that, except as indicated in the preceding paragraphs hereof, no substantial and material questions of fact have been raised by the pleadings. The Commission, however, is unable to make the statutory finding that a grant of the application would serve the public interest, convenience and necessity, and is of the opinion that the application must be designated for evidentiary hearing on the issues set forth below.

9. Accordingly, IT IS ORDERED, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned application IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether a grant of the application would impair the ability of authorized and prospective UHF television broadcast stations in the area to compete effectively, or would jeopardize, in whole or in part, the continuation of existing UHF television service.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, whether grant of the application would serve the public interest, convenience and necessity.

10. IT IS FURTHER ORDERED, That Channel Seventeen, Inc., IS MADE PARTY RESPONDENT in this proceeding.

11. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence with respect to issue 1, herein IS HEREBY PLACED upon the party respondent, and the burden of proof with respect to issues 1 and 2 IS HEREBY PLACED UPON the applicant.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant and the party respondent herein, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall within twenty (20) days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice, as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-636

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
LOUIS C. LANDON, BUCHANAN DAM, TEX.
For Review of Cancellation of Amateur
Operator and Station License

JUNE 19, 1974.

Mr. LOUIS C. LANDON,
P.O. Box 84,
Buchanan Dam, Tex.

DEAR MR. LANDON: This is in reply to your letter of February 1, 1974. Even though your letter was not timely filed as a petition for review, the Commission, on its own motion, has carefully reviewed the facts in this case and the action of its staff in cancelling the amateur operator and station license, WA5MTI, on December 21, 1973.

The call-in procedures and cancellation of license provision set forth in § 97.35 of the Commission's amateur rules are applicable to all amateur licenses which were obtained by a mail examination under the supervision of a volunteer examiner. Therefore, your former Amateur Extra Class license, WA5MTI, obtained under the mail examinations for disabled applicant provision, § 97.28, was also subject to the call-in provision and cancellation for failure to appear at an examination point or to undergo an examination at home under Commission supervision.

Upon review of the matter, we find that you were repeatedly afforded an opportunity to be examined at your home. You were further advised that your physical condition would be taken into account in both administering and grading the amateur examination. You have consistently refused to be examined by Commission personnel. The physician's statement accompanying your August 1, 1972, letter did not conclusively establish your inability to undergo a limited amateur examination at your home. In reconsideration of the entire record we are unable to state that the cancellation of your license for failure to appear or failure to undergo a Commission supervised amateur examination was improper and not in accordance with the Commission's Rules. Although our review of the record does not reveal any substantial issue of fact, if you have any further argument you may wish to present to the Commission for consideration, you may do so within twenty days from the date of this letter. If you furnish such information, and so request, the Commission will decide whether this case warrants designation for a full evidentiary hearing before an Administrative Law Judge. In the interim the cancellation of your license remains effective.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-257

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
JERRY LAWRENCE, SANTA PAULA, CALIF.	Docket No. 19865 File No. BPH-8051
WILLIAM F. WALLACE AND ANNE K. WALLACE, JOINT TENANTS, SANTA PAULA, CALIF.	Docket No. 19866 File No. BPH-8105
CLARK ORTONE, INC., FILLMORE, CALIF.	Docket No. 19867 File No. BHP-8111
CLASS A BROADCASTERS, INC., FILLMORE, CALIF.	Docket No. 19868 File No. BPH-8234
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted July 16, 1974; Released July 19, 1974)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. The above-captioned mutually exclusive applications for new FM broadcast stations were designated for consolidated hearing on a variety of issues by Commission Order, FCC 73-1198, 38 FR 32971, published November 29, 1973. Presently before the Review Board is a further petition to enlarge issues, filed May 28, 1974, by Class A Broadcasters, Inc. (Class A),[1] requesting the addition of an *ex parte* issue against William F. and Anne K. Wallace (the Wallaces).

2. In its petition, Class A observes that although the final date for filing petitions to enlarge in this proceeding was December 14, 1973, the document which gave rise to the instant petition was dated December 18, 1973, and was filed with the Commission on December 20, 1973. The document, a copy of which is attached to the petition, is addressed to the Review Board and signed by William F. Wallace. It was submitted before the Wallaces retained legal counsel.[2] Class A asserts that it received a copy of a letter, dated January 28, 1974, addressed to the Executive Director of the Commission and filed by counsel for the Wallaces referring to the subject document as an "inadvertent" written *ex parte* communication. Thereafter, on March 22, 1974, Class A requested a copy of the communication from the Executive Director. In response, Class A received a letter from the Executive Director, dated April 23, 1974, stating that the submission in question had been placed in a file associated with, but not made a part of, the instant

[1] Also before the Board are the following related pleadings: (a) comments, filed June 17, 1974, by the Broadcast Bureau; (b) opposition, filed June 17, 1974, by William F. and Anne K. Wallace; and (c) reply, filed June 27, 1974, by Class A.

[2] In the document, Mr. Wallace requests that if the Commission does not look favorably on the Wallaces' application, all applications in this proceeding should be denied and FM Channel 244A, as well as all other possible FM channels, should be deleted from the table of assignments for Santa Paula and Fillmore, California.

consolidated proceeding. Class A claims that it diligently pursued its inquiry with the Executive Director, but since he has taken no further action on the matter, Class A decided to file the instant petition. With regard to the merits, Class A contends that the document filed December 20, 1973, by the Wallaces is a prohibited *ex parte* presentation as defined by the Commission's *Rules Governing Ex Parte Communications*, 1 FCC 2d 49, 5 RR 2d 1681 (1965). Class A notes that the Wallaces did not file a notarized statement relating to the circumstances of the presentation, pursuant to Section 1.1241(e) of the Commission's Rules, and, since the Wallaces are principals of standard broadcast Station KAAP (formerly KQIQ), Santa Paula, California, they cannot argue that they are unfamiliar with the Rules. Therefore, Class A submits that inquiry into all the circumstances surrounding the alleged *ex parte* presentation is appropriate. The Broadcast Bureau, in its comments, supports addition of an issue.

3. In opposition, the Wallaces concede that the document they submitted qualifies "technically" as a prohibited *ex parte* communication, but argue that it was the result of an "innocent mistake". As an attachment to their opposition, the Wallaces include the affidavit of Mrs. Anne K. Wallace, dated April 8, 1974, attempting to explain the submission of the document in question. The Wallaces contend that since the violation was unintentional, and since they voluntarily brought the matter to the attention of the Executive Director and the parties, a disqualifying issue should not be added. Furthermore, the Wallaces declare that the Review Board should refuse to permit Class A to litigate the same factual question already reviewed by the Executive Director.

4. Class A argues, in reply, that several questions of fact are left unresolved by the affidavit of Anne K. Wallace, and that no statement has been submitted by William F. Wallace, the signer of the document. In addition, Class A avers that the Review Board is not precluded from making its own determination of whether the facts and circumstances warrant the addition of an issue.

5. The Review Board agrees with the Broadcast Bureau that Class A did not act diligently in filing the instant motion. Although Class A was aware of the Wallaces' submission since January 28, 1974, it did not contact the Executive Director until two months later and waited until mid-May to file its petition. Nevertheless, the Board is persuaded that the petition raises serious public interest questions which should be explored at the hearing. See *The Edgefield-Saluda Radio Co.* (*WJES*), 5 FCC 2d 148, 8 RR 2d 611 (1966). Contrary to the Wallaces' assertion, the Rules do not prevent a party from petitioning the Review Board for the addition of an issue after pursuing an inquiry with the Executive Director. "Section 1.1251(a) provides for the imposition of sanctions. . . . This provision does not, of course, preclude a party from raising the same questions on the record of the restricted proceeding." *Rules Governing Ex Parte Communications*, *supra*, 1 FCC 2d at 62, 5 RR 2d at 1697. Equally unavailing is the Wallaces' position that an issue should not be added because the

communication was unintentional.[3] Intent is not a factor in determining whether an *ex parte* offense has occurred but rather "is a factor in determining whether (and what) sanctions should be imposed."[4] *Rules Governing Ex Parte Communications, supra*, 1 FCC 2d at 56, 5 RR 2d at 1691.[5] The Wallaces' submission dealt with the merits of the instant proceeding; it was submitted after designation for hearing; and it was not served on the other parties. As licensees of an existing broadcast station, the Wallaces are responsible for knowledge of and compliance with the Commission's Rules. *WKTS, Inc.*, 30 FCC 2d 621, 622, 22 RR 2d 291, 292 (1971). Consequently, the Review Board believes that an evidentiary inquiry concerning the Wallaces' submission is required.

6. Accordingly, IT IS ORDERED, That the further petition to enlarge issues, filed May 28, 1974, by Class A Broadcasters, Inc., IS GRANTED; and

7. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by addition of the following issue:

> To determine whether William F. and Anne K. Wallace have engaged in conduct prohibited by the Commission's *ex parte* Rules, and, if so, the effect thereof on the applicant's basic and/or comparative qualifications to be a Commission licensee.

8. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the issue added herein SHALL BE on Class A Broadcasters, Inc., and that the burden of proof SHALL BE on William F. and Anne K. Wallace.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[3] The Wallaces cite *American Broadcasting Companies, Inc.*, 23 FCC 2d 136, 19 RR 2d 36 (1970), in support of their contention that their unintentional violation of the Rules does not merit addition of an issue. However, the factual situation in the cited case is clearly distinguishable, since the Review Board there found that the applicant offered a "convincing explanation" that the *ex parte* presentations made to the Commission as a result of the applicant's efforts to secure the endorsement of public officials were wholly inadvertent and occurred despite precautions on the part of the applicant.

[4] For this reason, we are following the Broadcast Bureau's suggestion and framing the issue on a basic and/or comparative basis. In its reply, Class A concurs in this result.

[5] See also *Voice of Reason, Inc.*, 37 FCC 2d 686, 709, 25 RR 2d 645, 672 (1972), review denied FCC 74-476, released May 8, 1974.

FCC 74-716

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of	
LEESBURG CABLEVISION, INC., LEESBURG, FLA.	CAC-862 FL065
LEESBURG CABLEVISION, INC., LAKE COUNTY, FLA.	CAC-863 FL239
LEESBURG CABLEVISION, INC., FRUITLAND PARK, FLA.	CAC-864 FL065
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1974; Released July 11, 1974)

BY THE COMMISSION:

1. Leesburg Cablevision, Inc., operates cable television systems at Leesburg, Fruitland Park, and portions of Lake County surrounding Leesburg and Fruitland Park, Florida.[1] Leesburg and Lake County are located in the Orlando-Daytona Beach, Florida, major television market (#55); Fruitland Park is outside all markets. The systems now provide their subscribers with the following television broadcast signals:

WESH-TV (NBC, Channel 2) Daytona Beach, Florida
WEDU (Educ., Channel 3) Tampa, Florida
WJXT (CBS, Channel 4) Jacksonville, Florida
WDBO-TV (CBS, Channel 6) Orlando, Florida
WFLA-TV (NBC, Channel 8) Tampa, Florida
WFTV (ABC, Channel 9) Orlando, Florida
WLCY-TV (ABC, Channel 10) St. Petersburg, Florida
WTVT (CBS, Channel 13) Tampa, Florida
WMFE-TV (Educ., Channel 24) Orlando, Florida

Leesburg Cablevision has filed applications for certificates of compliance to add the following signals to each of these cable systems:

[1] The populations and numbers of subscribers, as reported in the Leesburg Cablevision 325 Forms for 1972 are:

Community	Population	Subscribers
Leesburg	11,869	1,875
Fruitland Park	5,200	347
Lake County	1,560	234
Total	18,629	2,456

The three communities share one headend with 12-channel capacity.

WSWB–TV (Ind., Channel 35) Orlando, Florida
WTOG (Ind., Channel 44) St. Petersburg, Florida [2]

Carriage of these signals is consistent with Section 76.63 of the Commission's Rules. The applications are unopposed.

2. Since WTOG is a distant independent signal, Section 76.251(c) of the Rules would require Leesburg Cablevision to provide a public access channel and production facilities for each of the two major market systems.[3] Leesburg Cablevision requests a waiver to allow it to provide one studio for access and origination facilities, one public access channel, and one education access channel to serve Leesburg and Lake County. It proposes to combine the two educational television broadcast signals, now presented on two separate channels, so that it will have channel capacity available for the two access channels. Furthermore, it proposes to carry some programming from the educational television stations on the education access channel, when it is deemed to be in the public interest. Leesburg Cablevision argues that: the Lake County system serves only a small number of subscribers, few of whom are more than fourteen miles from the headend; the subscribers are close geographically, and share economic, political, and social interests; and it would be economically unfeasible to provide a separate headend for Lake County. Additionally, the system asserts that there has not been a substantial demand for access usage to date, and if the demand should exceed the available channels, the channel availability will be increased, and will be increased in any event by 1977.

3. The access proposal offered by Leesburg Cablevision is reasonable and consistent with our previous decisions concerning the sharing of access channels and production facilities in existing conglomerate systems. In Paragraph 147 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 197 (1972), we stated that small communities in major markets "are free to meet their [access] obligations through joint building . . . with cable operators in larger core areas." We believe that the size of these communities justifies a waiver of Section 76.251 to allow Lake County to share the production facility at Leesburg. We also recognized, in Paragraph 90 of the *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 359 (1972), that hardships might be incurred if existing conglomerate systems serving separate communities from a common headend were required to provide separate access channels for each community.

Accordingly, we have granted temporary waivers of Section 76.251 (c) to allow shared access channels.[4] We note that Leesburg Cablevision proposes to provide both public access and education access,

[2] WTOG is presently being carried on all three systems. It was authorized at Fruitland Park in *Leesburg Cablevision, Inc.*, FCC 69–593, 18 FCC 2d 49 (1969); however, at that time action was deferred as to Leesburg. When the new owner discovered it was carrying the signal in Leesburg and Lake County without authorization, it petitioned the Commission for special temporary authority to continue carriage pending action on its applications for certificates of compliance. Petitions for Special Temporary Authorization were granted February 13, 1974, *Leesburg Cablevision, Inc.*, FCC 74–159, 45 FCC 2d 357 (1974).

[3] There are no access requirements for Fruitland Park since it is outside all markets.

[4] See *TelePrompTer of Portsmouth, Inc.*, FCC 73–1207, 43 FCC 2d 1232 (1973); *Montachusett Cable Television, Inc.*, FCC 73–1057, 43 FCC 2d 440 (1973).

although public access is all that is required of it at this time. However, it proposes to carry some educational television programming on the education access channel. Station WFME–TV (Educ.), Orlando, Florida, is a "must carry" signal for the Leesburg and Lake County systems. In *Monroe All-Channel Cablevision, Inc.*, FCC 74–200, 45 FCC 2d 764 (1974), we disapproved a proposal to "double-up" educational access cablecasting and a local educational broadcast signal.[5] However, in the instant case, Leesburg Cablevision has one channel available for educational television broadcast signals only; another channel will be used for education access cablecasting plus educational television broadcast programming when it is "in the public interest." Neither educational television station has objected to the proposal to combine the two on one channel. Since Leesburg Cablevision is not obligated to provide education access channels until 1977, and it has sufficient capacity to carry the signal of the Orlando educational broadcast station, we have no objection to the temporary sharing of one public access channel for Leesburg and Fruitland Park, and one combined education access channel.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application[s] for Certificate[s] of Compliance" (CAC–862, CAC–863, and CAC–864) and the "Petition for Special Relief, Petition for Waiver" filed by Leesburg Cablevision, Inc., ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Secretary.*

[5] *But see Metro Cable Company*, FCC 73–89, 39 FCC 2d 169 (1973), in which we approved a plan for a cable system to carry some of the programming of a distant educational television station, which the cable system could lawfully carry, on the education access channel. However, we stressed that the selection of the programs would be left to the local educational authorities.

FCC 74-717

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re PALMETTO CABLEVISION, INC., RICHLAND COUNTY, S.C. Request for Order To Show Cause	CSC-88 (SC039)
PALMETTO CABLEVISION, INC., RICHLAND COUNTY, S.C.	CAC-1269 (SC039)
COLUMBIA CABLE TV CO., INC., RICHLAND COUNTY, S.C. Applications for Certificates of Compliance	CAC-2481 (SC053)

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1974; Released July 12, 1974)

BY THE COMMISSION:

1. The Commission has under consideration applications for certificates of compliance to serve the unincorporated areas of Richland County, South Carolina, filed by Palmetto Cablevision, Inc. and Columbia Cable TV Co., Inc. Richland County is located within the Columbia, South Carolina television market (#100). Palmetto carries the following television broadcast signals:

WIS-TV (NBC, Channel 10) Columbia, South Carolina
WNOK-TV (CBS, Channel 19) Columbia, South Carolina
WOLO-TV (ABC, Channel 25) Columbia, South Carolina
WRLK-TV (Educ., Channel 35) Columbia, South Carolina

Palmetto now seeks to add:

WTCG-TV (Ind., Channel 17) Atlanta, Georgia
WRET-TV (Ind., Channel 36) Charlotte, North Carolina

Columbia proposes to carry all of the above television signals with the exception of WRET-TV. Instead, Columbia requests authorization to carry WRIP-TV (Ind., Channel 61) Chattanooga, Tennessee. Carriage of these signals is consistent with Section 76.63 of the Rules, and the proposed signal carriage is unopposed.[1]

2. On March 21, 1974, Columbia filed a "Petition for Issuance of a Cease and Desist Order" directed against Palmetto for allegedly carrying three distant signals on its cable system without Commission

[1] Both applicants have submitted a proposed access program that complies with the provisions of Section 76.251 of our Rules. The population of Richland County is approximately 120,326. Palmetto's application was filed September 21, 1972, and its system has a 26-channel capacity. Columbia's application and request for special relief was filed May 7, 1973, and it proposes a 30-channel system.

authorization. Columbia alleges that Palmetto has gained an unfair competitive advantage by illegally carrying the following distant television broadcast signals:

WRET–TV (Ind., Channel 36) Charlotte, North Carolina
WRDW–TV (NBC, Channel 12) Augusta, Georgia
WJBF (ABC, Channel 6) Augusta, Georgia

Columbia requests that Palmetto's application for certificate of compliance not be granted until such time as the competitive balance between the two systems at Richland County is restored, and that Palmetto be ordered to show cause why a cease and desist order should not be issued.

3. Palmetto, in its response, asserts that carriage of WRDW–TV and WJBF is used only to supply missing network programs pursuant to Section 76.61(e)(2) of the Rules.[2] As for WRET–TV, it was carried prior to February 27, 1974, for a period of three hours. During that time WRET–TV was broadcasting only religious programming, some of which was in Spanish. Palmetto provided no further information explaining this brief carriage. On February 27, 1974, the Commission authorized the carriage of WRET–TV on Palmetto's system at Lexington County, adjacent to Richland County. Both the Richland and Lexington systems are served by the same headed, and Palmetto began full carriage of the signal on both systems. However, on March 27, 1974, upon realizing that WRET–TV could not be carried by the Richland system without Commission authorization, Palmetto deleted the signal from both systems.

4. Palmetto's justification for carriage of WRDW–TV and WJBF is uncontroverted by Columbia and is clearly consistent with our Rules. Carriage of WRET–TV is an admitted violation but one which appears to have been unintentional, of such short duration, and so promptly rectified, as to be *de minimis*. Further, Columbia has not substantiated its allegation that Palmetto unfairly gained a competitive advantage in Richland County. Accordingly, we will deny Columbia's petition. There being no necessity to consider further the issues raised in the petition, we may proceed to the merits of the present applications.

5. Palmetto and Columbia have opposed each other's application for certification. In Columbia's opposition, filed November 22, 1972, it argues that the Supreme Court of South Carolina has not determined whether counties in that state may grant franchises and, therefore, certification of Palmetto's application would be premature. In a "Supplemental Opposition to Certificate of Compliance on Character Qualifications Ground", Columbia further alleges that Palmetto has failed to satisfy the necessary character qualifications imposed by Section 76.31 of the Rules in that Palmetto has misrepresented its

[2] Section 76.63 incorporates Section 76.61(e)(2) of the Rules, which provides that: "In addition to the television broadcast signals carried pursuant to paragraphs (a) through (d) of this section, any such cable television system may carry:

* * * * * * *

"(2) Any television station broadcasting a network program that will not be carried by a station normally carried on the system. Carriage of such additional stations shall be only for the duration of the network program not otherwise available, and shall not require prior Commission notification or approval in the certificate process."

present signal carriage in its application and in its verified annual report to the Commission and by operating in defiance of current Commission regulations. Columbia also restated the allegations it presented in its petition for issuance of a Cease and Desist Order, stating that Palmetto's illegal carriage of WRET–TV, WRDW–TV, and WSBF raises the question of Palmetto's character qualifications. As noted above, we are convinced that Palmetto has adequately demonstrated that it was not attempting to circumvent our rules, and accordingly, this issue of character qualifications is moot, In addition, the Commission takes note of the South Carolina Supreme Court decision in *Richland County, State of South Carolina* v. *Palmetto Cablevision, Inc.*, 199 S.E. 2d 168 (1973), which held that counties in that state do not have franchising powers.[3] This decision renders moot Columbia's argument. Palmetto contends that Columbia's application is simply a "thinly veiled" attempt to protect itself from legitimate competition by demanding consolidated processing with Palmetto's application. However, since we have determined to consolidate both applications for simultaneous action, we find that Palmetto's objection needs no further consideration.[4]

6. Palmetto's application is also opposed by Palmetto Radio Corporation, licensee of Television Station WNOK–TV, Columbia, South Carolina. Both Palmetto Radio and Columbia Cable allege that Palmetto was not in operation prior to March 31, 1972, within the meaning of the Commission's Rules. Therefore, they argue, it must either comply with Section 76.31 of the Rules or present an acceptable alternative proposal pursuant to Paragraph 116 of the *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 366 (1972). There the Commission stated that if there is no franchise or other appropriate authorization available for a cable operator to submit in his application for certificate of compliance, the Commission will deal with the situation on a case-by-case basis through the special relief provisions of Section 76.7 of the Rules.

7. In its reply to arguments that it was not in operation prior to March 31, 1972, Palmetto states that on March 24, 1972, it was providing actual service to nine homes. Palmetto argues that the determining factor is not whether the cable television facility in all respects conforms with Section 76.5(a) of the Rules, but rather whether a system was delivering service to a significant number of subscribers, citing our decision in *Service Electric TV Cable, Inc.*, 32 FCC 2d 334 (1971). However, we need not reach this issue because it appears that Palmetto's proposed operations are consistent with the current rules applicable to new systems. In its application Palmetto has supplied all information required of new systems including, by amendment dated January 23, 1973, a petition for special relief pursuant to Paragraph 116 of the *Reconsideration of Cable Television Report*

[3] The Richland County Council filed an opposition to Palmetto's application requesting the Commission to delay processing the application pending a final decision of the County's authority to franchise cable television service. In light of the State Supreme Court's decision, the County Council's objection is moot.

[4] We have, of course, consolidated separate applications for certification when they involved the same community. *Lake County Cable TV, Inc.*, 42 FCC 2d 952 (1973).

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and Order, supra (see discussion below). As stated earlier, Palmetto's signal carriage complies with Section 76.63 of the Rules and its proposed access program satisfies Section 76.251. Therefore, there is no reason to require this system to provide the same type of supplementation that we ordered in *Southern Illinois Cable*, 44 FCC 2d 460 (1973). Therefore, Columbia's objection will be dismissed.

8. In the absence of franchises, both applicants have proposed to operate their systems in compliance with the provisions of Section 76.31 of our rules: significant construction will begin within one year after certification; a local business office will be maintained; there will be an agent to receive, investigate and resolve subscriber complaints; subscriber fees will be equitable; and subsequent modifications of the Commission's rules will be observed. In addition, Columbia notes that it will publish initial installation and subscription fees in a newspaper of general circulation, maintain its rates according to industry standards, and not increase rates without notice to its subscribers. We find these assurances to be an acceptable alternative proposal to assure compliance with the policies of Section 76.31 of our rules. *See Television Communications Corporation*, 41 FCC 2d 945 (1973). Consistent with our practice in similar cases, we shall certify both proposed systems until March 31, 1977.[5] These grants are made subject to any further orders of the Commission designed to resolve general problems inherent in non-franchised cable operations, or to address any special problems that may be brought to the Commission's attention involving cable operations in the subject communities.

9. We agree with the contention by Palmetto Radio Corporation that Palmetto has failed to specify which specific areas it will serve within the unincorporated areas of Richland County, and we note, *sua sponte*, that Columbia's application is similarly deficient. This is a matter which must be resolved. Although in the instant case, it does not appear that the proposed signal carriage would be affected, it is possible that a system serving one area in a county might be required or permitted to carry signals not required or permitted in another area in the same county. Further, it has been our determination that all parts of a franchise area be equitably served.[6] We must take the pragmatic view that few systems propose to serve only specific areas. The decision as to which areas in a county will be served is, normally, the responsibility of the franchising authority. Where there is no such authority the system itself must decide which community or area it will serve. In either case, the Commission must be given this information in detail. Accordingly, while we grant the captioned applications, we shall withhold issuance of the certificates pending notification of the specific areas proposed to be served in Richland County.[7]

In view of the foregoing, the Commission finds that a denial of the Petition For Order to Show Cause and a grant of the captioned applications would be consistent with the public interest.

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[5] *Palmetto Cablevision, Inc.*, 46 FCC 2d 775 (1974); *Lowlands Cablevision, Inc.*, 45 FCC 2d 761 (1974).

[6] Paragraph 180, *Cable Television Report and Order*, 36 FCC 2d 143, 208 (1972).

[7] See paragraph 65, *Clarification of Rules and Notice of Proposed Rulemaking*, 46 FCC 2d 175, 194 (1974).

Accordingly, IT IS ORDERED, That the "Petition for Issuance of a Cease and Desist Order" (CSC–88) filed by Columbia Cable TV, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Objection of Palmetto Radio Corporation pursuant to Section 76.27" filed by Palmetto Radio Corporation Inc. IS GRANTED to the extent reflected herein, and is otherwise DENIED.

IT IS FURTHER ORDERED, That the opposition filed by the Richland County Council directed against the application of Palmetto Cablevision, Inc. IS DISMISSED.

IT IS FURTHER ORDERED, That "Opposition to Application for Certification and Request for Special Relief" filed by Palmetto Cablevision Inc. IS DISMISSED.

IT IS FURTHER ORDERED, That the Application for Certificate of Compliance (CAC–1269), filed by Palmetto Cablevision, Inc. for Richland County, South Carolina, IS GRANTED and an appropriate certificate of compliance will be issued in accordance with Paragraph 9 above.

IT IS FURTHER ORDERED, That the "Application for Certification and Request for Special Relief" (CAC–2481), filed by Columbia Cable TV Co., Inc. IS GRANTED and an appropriate certificate of compliance will be issued in accordance with Paragraph 9 above.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Secretary.*

FCC 74-756

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE PRIME TIME ACCESS RULE, SECTION 73.658(k) OF THE COMMISSION'S RULES	Docket No. 19622

FURTHER NOTICE INVITING COMMENTS

(Adopted July 9, 1974; Released July 17, 1974)

BY THE COMMISSION: COMMISSIONERS LEE, REID, AND HOOKS CONCURRING IN THE RESULT.

1. In this Further Notice, the Commission invites comments on various matters mentioned in the recent decision of the United States Court of Appeals for the Second Circuit, reversing in part the Commission's decision of January 1974 (Docket 19622) which made changes in the prime time access rule, Section 73.658(k) of the Commission's Rules.[1]

2. The Docket 19622 proceeding was an investigation of the rule and its operation, looking toward any necessary modification, whether the rule should be retained in its existing form, or abolished. In January of this year, the Commission decided the matter in favor of a number of modificatons,[2] and this decision was appealed to the U.S. Court of Appeals for the Second Circuit. The Court reached its decision in June,[3] and enjoined the changes made by the Commission from becoming effective before September 1975. All petitions [4] were otherwise dismissed without prejudice to their being brought again in light of any subsequent Commission decision. The Court did not remand the case to the Commission for further proceedings (except as to setting a new effective date) and did not give any specific instructions, but did say that it would be helpful for the Commission to reconsider what it had

[1] *Report and Order* in Docket No. 19622, 44 FCC 2d 1081 (1974).

[2] 44 FCC 2d at 1131.

[3] *National Association of Independent Television Producers and Distributors (NAITPD), et al.* v. *FCC*, Case Nos. 74-1168, 74-1283 and 74-1348, decided June 18, 1974. Reconsideration of the Court's decision has been sought by appellants Warner Bros., *et al.*, which automatically stays the Court's mandate until it is disposed of. However, in view of the need for expedition in this matter, we are proceeding with the issuance of this Further Notice. Further action herein is, of course, subject to any further Court action which may be taken.

[4] Petitions for review were filed on behalf of National Association of Independent Television Producers and Distributors (NAITPD); Westinghouse Broadcasting Company, Inc. (Westinghouse); Warner Bros., Inc. and Columbia Pictures Industries, Inc. (Warner and Columbia). Intervenors in the case were: American Broadcasting Companies, Inc. (ABC); CBS Inc. (CBS); National Broadcasting Company, Inc. (NBC); Time-Life Films, Inc. (Time-Life); MCA, Inc. (MCA); National Committee of Independent Television Producers (NCITP); and Samuel Goldwyn Productions (Goldwyn). Sandy Frank Co. (Sandy Frank) filed as Amicus Curiae and the Department of Justice filed on behalf of the Respondent United States of America.

done, and mentioned a number of specific areas where the Court believed the Commission could have given greater or more precise consideration.[5]

3. Docket No. 19622 was a lengthy and complicated proceeding, with participation by some 63 different interested organizations and individuals, who filed extensive comments, and, in some instances, participated in an oral argument which lasted two days.[6] The Commission does not wish to burden these participants or other parties with re-doing what they have already done; therefore, where matters raised in this Further Notice have already received discussion, and conditions remain substantially unchanged, interested parties are encouraged to state their positions, and where possible, to refer the Commission to previous presentations. Where new issues or conditions have arisen, or where previously filed material requires amendment or updating, interested parties may file whatever materials they believe necesary for the Commission to deal with the questions raised in this Further Notice. Also, as discussed below, we welcome comments from groups and individuals of the character mentioned by the Court, such as minority groups and consumer groups.

4. Essentially, the purpose of this Further Notice is to invite comments—hopefully more than repetition—on the specific matters mentioned by the Court and also from the kinds of groups and individuals who the Court appeared to believe had not been sufficiently heard from in this proceeding. In light of these comments, we will carefully review our decision. But the material filed in response to this Further Notice (or filed earlier and referred to by parties now) will be thoroughly considered and our decision reviewed in light of it. As a result of this inquiry, our decision could remain essentially unchanged, the original rule could be retained, some resolution between these alternatives could be reached, further modifications could be made resulting in less "cleared" time, or conceivably the rule could be repealed.[7] Whatever the Commission decides regarding the substance of the rule, the question of the effective date must also be considered, and therefore, comment is also invited as to the date each of the possible alternatives should become effective.

MATTERS MENTIONED BY THE COURT'S OPINION

5. The Court stated that the Commission may wish to take advantage of the additional year to reconsider its changes in the rule,[8] and

[5] These recommendations for further inquiry from the court are considered in greater detail in paragraphs 5–13, *infra*. The matter of the effective date of the rules is discussed in paragraph 4.

[6] A compilation of participants is contained in Appendix B of the *Report and Order*, 44 FCC 2d at 1150–1152.

[7] Of the six specific points as to which the Court expressed the view that further exploration would be helpful, three are matters primarily urged in the proceeding by Warner Bros. and similar opponents of the rule as reason for its repeal (some of whom were appellants before the Court). The three points are: Network dominance has been increased by the rule; the lessened production activity resulting from the rule has had an adverse "impact on Hollywood;" and the rule has resulted in more commercial advertising during the access period.

[8] The changes made in the January 1974 decision were: (1) removal of all restrictions from Sunday (the networks planned to program four hours of prime time starting this fall); (2) removal of all restrictions from the first half-hour of prime time (7–7:30 p.m. E.T., etc.); (3) tying "cleared" access time specifically to the 7:30–8 p.m. E.T. period Monday–Saturday; (4) providing that one of these six "cleared" half-hours may be used for network and off-network children's "specials," documentary or public affairs programming (the networks had planned to make considerable use of the Saturday half-hour for these kinds of programs); and (5) barring feature film from the access half-hours.

mentioned certain particular matters as to which it suggested further consideration or exploration. Three of these are economic matters (the network-dominance argument mentioned in footnote 7, the effect of the rule on competition, and the "impact on Hollywood"); and the Court suggested also that we seek the views of groups who had not previously participated to a great extent, mentioning in this connection three other matters: Television advertising, as to which consumer groups might be helpful; the character of programming with respect to minority needs (as to which minority groups might be consulted); and "playwrights and actors on the effects of the rule on their professions." (The list was said to be neither binding nor exclusive.)

6. *The rule and network control or dominance.* The first matter which the Court believed the Commission should consider further was the question of whether the justification for the rule in 1970–71—as a means to lessen network domination of prime time television—is valid in practice. The Court cited arguments made by Warner Bros., and a statement contained in a report of the Commission's economist.[9] to the effect that the rule had actually strengthened the position of the networks. The Court indicated that the Commission's finding that such arguments were "somewhat speculative"[10] may not be enough, stating:

> The Commission might accept an opposing view or formulate its own conclusions, so long as it fully explains its reasons for so doing.[11]

Parties may wish to submit factual, comparative and current, data as to prices charged advertisers by networks, prices the networks pay producers for programs, the extent to which any differences in these respects result from the rule (rather than other factors such as inflation), the extent to which the network-owned stations buy syndicated programs as a group and such sale is necessary to a program's success, and the present and past extent of station preemptions of network prime time programs (with some indication as to whether any decline is attributable to the rule or to other factors such as longer network programs).

7. *Effect on competition.* The Court noted that the Department of Justice had not participated in Docket No. 19622 until the time of the review by the Court, when a brief was filed which stated that the modification of the rule "represents . . . a serious weaking of its basic purpose . . .," to reduce the threat to diversity in broadcasting represented by the concentration of programming control in the three television networks.[12] The Court went on to state that the national policy favoring competition is one the Commission should consider, that the views of the Department of Justice would be relevant, and that the Court's review would be facilitated if the Commission would solicit these views.[13]

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[9] *The Economic Consequences of the Federal Communications Commission's Prime-Time Access Rule on the Broadcasting and Program Production Industries,* by Dr. Alan Pearce (September 1973). Page 1.

[10] 44 FCC 2d at 1140–41.

[11] *NAITPD, et al* v. *FCC,* footnote 3, *supra.*

[12] *NAITPD et al* v. *FCC,* Brief for the United States of America, p. 2. The Department of Justice went on to say, however, that the Commission had acted within its statutory powers, had considered the relevant factors and made a rational decision. The Court stated that the Department's brief does not give any factual basis for the argument that the rule works to lessen network dominance, and does not show awareness of the Commission's economist's statement.

[13] *NAITPD, et al* v. *FCC,* footnote 8, *supra.*

8. We will solicit the views of the Department of Justice on this question, and invite comments from other parties on it. The Court did not specify what is meant by the rather general term "competition"; it is obvious that the matter has a number of different aspects which parties may wish to discuss, including: (1) competition among producers and distributors of programs and types of programs (bearing in mind the extent to which prime time network and first-run syndicated programming respectively tend to represent the output of a small number of producers); (2) competition among stations, e.g., network affiliates and independents; (3) competition among business enterprises generally to the extent that the rule facilitates local and regional advertising rather than advertising by large national concerns; and (4) the general "competition" among programs and ideas for the attention and education of the public.

9. "*Impact on Hollywood*" *and employment in production and distribution.* The final economic question raised by the Court is the effect of the Commission's decision upon employment patterns in the United States program production industry, or the "impact upon Hollywood." The Court found the Commission's lengthy discussion of this question and the conclusions thereon [14] "ambiguous" and requested a more decisive statement from the Commission on whether this is a legitimate matter of concern for the Commission, what the impact of the rule is upon domestic program production employment, and how this impact is evaluated in the decision.[15]

10. Of the various areas mentioned by the Court, this is perhaps the most difficult, which, if required to be pursued in its entirety, might well preclude any decision within a reasonable period. We are not prepared at this time to answer the threshold question of relevance. Parties may wish to comment on this question and on the factual content of the subject; it is hoped that those discussing the facts will deal with:

(a) the number of persons involved in producing network and first-run syndicated programs of various types and lengths;

(b) the number of persons involved in network and syndicated program distribution and in network and individual station sale of the access time involved.

(c) the number of persons involved in *local* program production to the extent locally produced programming is increased under the original rule and under the revised rule.

(d) the extent to which use of foreign-produced material is increased under the rule (original or revised) and the impact of any such increase on U.S. production activity and employment.

11. *Views of other groups.* The remaining matter which the Court believed the Commission had not paid sufficient attention to might be called the views of the unrepresented. The Court stated that the Commission has a fundamental obligation to further the *public* interest, particularly when the question has broad impact on the public by directly affecting what millions of Americans watch each night on

[14] 44 FCC 2d at 1141 and 1157–1161.
[15] *NAITPD, et al* v. *FCC*, footnote 3, *supra*.

their television sets, and that the Commission's decision was too much a compromise among opposing private interests. While not holding the Commission's efforts insufficient as a matter of law, the Court suggested that the Commission could have done more. The Court recommended that the Commission consult consumer groups and others on the effect of the rule on increased amounts of advertising on television during prime time; minority groups on the impact of the rule on programming for minorities; and writers and actors as to the effect of the rule on their professions. It was said that these were only suggestions, and not to be considered a binding or exclusive list.[16]

12. Although not noted in the Court's opinion, there was participation in this proceeding by entities of these categories—three "public" groups and two minority-group members appearing for themselves but concerned with minority problems.[17] Actors and playwrights participated to the extent they were represented by Screen Actors Guild and Writers Guild of America West, whose participation the Court noted. The views of these parties were carefully considered, although, as far as the "public" and minority-group parties were concerned, their views were not discussed as such in our January *Report and Order* (the discussion related to similar views of other parties elaborated at greater length). As the Court noted, our decision also took into account public reaction in another respect—feelings of parents, teachers and children that the rule resulted in an undesirably late start for children's "specials."

13. We invite and solicit comments from parties of these types, and the public generally, concerning the merits of the rule and, in particular, the following three subjects particularly mentioned by the Court:

(a) Views of "consumer" groups, and viewers generally, concerning the amount of advertising on television during the access period, compared to what would be presented if network programs were being carried instead. As indicated in paragraph 9, above, parties are also invited to comment on a matter which is to some extent the other side of this question—the benefit of increased opportunity for local and regional advertisers to present their messages during prime time.

(b) Views of minority groups, and minority-group members, concerning access-period programming as compared to network programming, particularly in relation to meeting the needs and interests of minority groups.

(c) Views of those creatively involved in the program production process—including actors, playwrights, musicians and other performers—concerning the impact of the rule on their professions and opportunity therein.[18]

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[16] *NAITPD, et al* v. FCC, footnote 3, *supra*.

[17] The three public groups—American Civil Liberties Union, National Citizens Committee for Broadcasting, and Action for Children's Television—supported the original rule; the two minority-group individuals opposed it, and the Guilds and other Hollywood labor organizations opposed it and urged its repeal. The SAG minority committee participated in the oral argument, opposing the rule.

[18] To the extent that such persons are represented by guilds such as SAG and the Writers Guild, they have already participated and may do so in this manner again. However, AFTRA did not participate earlier, and individual expressions from such persons are also welcome.

CONCLUSION AND OTHER MATTERS

14. To summarize the foregoing comments are invited as follows (subject to the *caveat* in paragraph 3, above, about referring to, rather than repeating, material already submitted):

(a) by interested parties on the subjects mentioned in paragraphs 6 to 11 and 13, above: (1) the rule (original and as modified) and network control or dominance (paragraph 6); (2) the rule (original and as modified) and competition; the views of the Department of Justice are particularly sought (paragraphs 7–8); (3) the effect of the rule (original and as modified) on employment in the production industry and in broadcasting, including persons creatively involved in the production process on their professions and opportunities (paragraphs 9, 10, and 13); (4) the date of effectiveness of any of the various possible resolutions (retaining the modified rule; returning the original rule; some intermediate resolution between these two possibilities; further modification resulting in less "cleared" time; or repeal of the rule, as well as the matters specifically mentioned above.

(b) by entities other than those having a direct economic interest in this proceeding—e.g., consumer and public groups, minority groups, and members of the public—concerning the merits of the original and revised rule generally.

15. Time for comments and effective date. In order to remove the existing uncertainty as quickly as possible, the Commission is persuaded that a decision should be reached early this fall. Accordingly, we are allowing slightly more than five weeks for comments and two weeks for replies, in order that a decision may be made promptly. Considering the extent to which the various aspects of this general subject have already been explored, with participation by many of the parties with a direct economic interest, these periods appear sufficient. No extensions of time beyond the dates set herein are contemplated.

16. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules interested persons may file comments on or before August 16, 1974, and reply comments on or before August 30, 1974. All relevant and timely comments and reply comments will be considered by the Commission before action is taken herein. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

17. Section 1.419 of the Commission's Rules requires that an original and 14 copies of all comments, replies, pleadings, briefs, etc., shall be filed with the Commission. This requirement will apply to the principal parties directly involved in this matter, such as the court appellants and intervenors, the networks, station licensees, etc. However, in the interest of facilitating comment from the viewing public, the 14-copy and format requirements will not apply to letters and other expressions from individuals. Such comments will be considered and placed in the docket. Also, the rather substantial material already filed herein should not be filed again, but incorporated by reference. Material

filed will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its headquarters in Washington, D.C. and also at the office of the Commission's Office of Network Study.

18. This further proceeding is instituted pursuant to Section 1.421 of the Commission's rules, and authority contained in Section 403, and Sections 3 (p), 4(i), 303 (b), (g), (i) and (r), 313, 314 and 315 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-754

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 73 OF THE COMMISSION'S RULES—RADIO BROADCAST SERVICES—To CLARIFY EXISTING REFERENCES TO TIME

ORDER

(Adopted July 9, 1974; Released July 16, 1974)

B. THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has reviewed section 73.83 of its rules ("References to time") in light of the recent enactment of year-around daylight saving time legislation (PL 93-182), as well as changes made over the past five years in the rules dealing with the operating hours of broadcast stations, under which the times listed in most license documents and other authorizations are now specifically designated as "standard (non-advanced)," "advanced," or "local," as appropriate.

2. On the basis of this review, it has been determined that section 73.83 is unnecessarily complex and, in some important respects, now obsolete. A simplification and updating of the rule is therefore indicated.

3. Authority for the adoption of this Order is contained in sections 4(i), 303(c), and 303(r) of the Communications Act of 1934, as amended. Since it is intended only to reinterpret and clarify existing requirements, compliance with the notice and effective date provisions of the Administrative Procedure Act (5 U.S.C. 553) would serve no useful purpose and is otherwise unnecessary.

4. Accordingly, IT IS ORDERED, That, effective July 23, 1974, section 73.83 of the rules IS AMENDED, and a new section (73.1209) IS ADDED in the manner set forth in the Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 73 of Chapter I, Title 47, Code of Federal Regulations, is amended as follows:

1. Section 73.83 is amended to read as follows:

§ 73.83 REFERENCES TO TIME.

See § 73.1209.

2. A new section (73.1209) is added to read as follows:

§ 73.1209 REFERENCES TO TIME.

Unless specifically designated as "standard (non-advanced)" or "advanced," all references to time contained in this part, and in license documents and other authorizations issued thereunder shall be understood to mean *local* time; i.e., the time legally observed in the community.

FCC 74R-258

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of RKO GENERAL, INC., (WOR-TV), NEW YORK, N.Y. For Renewal of Broadcast License	Docket No. 19991 File No. BRCT-71
MULTI-STATE COMMUNICATIONS, INC., NEW YORK, N.Y. For Construction Permit for New Television Broadcast Station	Docket No. 19992 File No. BPCT-4527

MEMORANDUM OPINION AND ORDER

(Adopted July 16, 1974; Released July 19, 1974)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. Before the Review Board for consideration is a petition to enlarge issues, filed May 30, 1974, by Multi-State Communications, Inc. (Multi-State), directed against the renewal application of RKO General, Inc. (WOR-TV).[1] Multi-State seeks the addition of the following issues:

> 1. To determine whether RKO General, Inc. (RKO) has complied with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of substantial changes in its application.
>
> 2. To determine, in light of facts adduced pursuant to the foregoing issue, whether RKO possesses the basic qualifications to be a broadcast licensee.

2. Multi-State predicates its request for the addition of a Rule 1.65 issue on RKO's alleged failure to make a timely disclosure to the Commission of the Institution of an anti-trust suit filed by Phillips Petroleum Company in the United States District Court for the Central District of California against Aerojet General Corporation (Aerojet), a subsidiary of General Tire and Rubber Company, RKO's parent company, and others, charging them with violations of Sections 1 and 2 of the Sherman Anti-Trust Act.[2] According to petitioner, RKO did not attempt to amend its application to reflect Aerojet's involvement in the anti-trust litigation until May 15, 1974,[3] desipte the fact that the anti-trust allegations were brought by the plaintiff in January, 1974.

[1] The Board also has before it for consideration the following related pleadings: (a) Broadcast Bureau's comments, filed June 10, 1974; (b) opposition, filed June 12, 1974, by RKO; and (c) reply, filed June 19, 1974, by Multi-State.

[2] According to an amendment to RKO's application, filed May 15, 1974, a civil suit pending against Aerojet and others was amended in January, 1974, by the plaintiff, Phillips Petroleum Company (Phillips), to include anti-trust allegations against the same defendants. Multi-State does not contend that the suit as originally filed by Phillips was of decisional significance in this proceeding.

[3] The amendment was accepted by Order of the Administrative Law Judge, FCC 74M-602, released May 29, 1974.

See note 2, *supra*. Petitioner alleges that the May 15, 1974, amendment was submitted several months beyond the thirty-day limit prescribed by Rule 1.65, and that the late amendment was not filed with due diligence. Additionally, petitioner contends that since the Commission has long been concerned with an applicant's association with anti-competitive activities—even where such activities occur outside the field of broadcasting—the anti-trust suit against Aerojet was of decisional significance. Consequently, petitioner asserts that a Rule 1.65 issue against RKO is warranted. The Broadcast Bureau concurs with Multi-State's request for a Rule 1.65 issue; however, the Bureau recommends that the issue be added on a comparative, rather than a disqualifying, basis.[4]

3. Opposing enlargement, RKO contends that it exercised due diligence in notifying the Commission on May 15, 1974, of the Aerojet litigation.[5] Second, RKO, while not challenging the general proposition relied upon by Multi-State that the Commission has long been concerned with an applicant's involvement in anti-trust violations, contends that the nexus between RKO and Aerojet [6] is far too remote to render the anti-trust suit against the latter a matter of decisional significance [7] under Rule 1.65.[8] Finally, RKO asserts that even if the Review Board were to find a Rule 1.65 violation here, such a transgression would be too insubstantial to warrant the addition of a Rule 1.65 issue.

4. The petition will be denied. The Review Board agrees with Multi-State and the Broadcast Bureau that Rule 1.65 required the timely disclosure to the Commission of the existence of the anti-trust suit against Aerojet. However, in light of the voluntary disclosure of the information in question to the Commission; the factors cited for the delay in furnishing the information (see note 5, *supra*); the nature of the relationship between RKO and Aerojet; the lack of any indication of intent or motive to conceal; and the fact that the delay in reporting was not substantial, the Board deems the violation of Rule 1.65 not to be of sufficient magnitude to warrant an evidentiary inquiry.

5. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed May 30, 1974, by Multi-State Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

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[4] According to the Bureau, the addition of the Rule 1.65 issue on a comparative, rather than a disqualifying, basis is justified here in light of the lack of any motive to conceal the information; the voluntary, albeit late, disclosure by RKO; and the absence of any prior rule infractions by RKO.

[5] In support, RKO attaches an affidavit of Hubert J. DeLynn, a vice president of RKO, who states that he is responsible for RKO's compliance with the Commission's disclosure requirements. According to the affidavit, DeLynn first became aware of the Aerojet litigation on May 9, 1974, and immediately drafted an amendment to the application, which was submitted to the Commission shortly thereafter.

[6] RKO states in its opposition that the business operations of Aerojet and itself are totally separate. In support of its contention, RKO notes that "Aerojet is engaged in the fields of rocket propulsion electronics, ordnances, specialty manufacturing and other diversified advanced technologies."

[7] According to RKO, of all the cases relied upon by Multi-State and the Bureau to illustrate that the suit against Aerojet was a matter of decisional significance, only one, *Southern Broadcasting Co.*, 38 FCC 2d 461, 25 RR 2d 1138 (1973), is apposite. However, RKO strenuously maintains that *Southern Broadcasting*, standing alone, is insufficient precedent to justify the addition of a Rule 1.65 issue in the instant case, particularly where the Review Board's Memorandum Opinion and Order in *Southern Broadcasting* has yet to be reviewed by the Commission.

[8] RKO also contends that FCC Form 303 does not require the submission of the material in question.

FCC 74R-265

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
RKO GENERAL, INC. (WOR-TV), NEW YORK, N.Y.	Docket No. 19991 File No. BRCT-71
For Renewal of Broadcast License	
MULTI-STATE COMMUNICATIONS, INC., NEW YORK, N.Y.	Docket No. 19992 File No. BPCT-4527
For Construction Permit for New Television Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted July 18, 1974; Released July 23, 1974)

BY THE REVIEW BOARD:

1. Before the Review Board is a motion to delete issues, filed April 25, 1974, by Multi-State Communications, Inc. (Multi-State), seeking deletion of the following issues designated by the Commission in its Order, FCC 74-328, released April 10, 1974:[1]

> 1. To determine with respect to the application of Multi-State: a. Whether James Torres has sufficient funds to meet the stock subscription commitment to the applicant. b. The amount of paid-in capital available to the applicant. d. The cost of rental or construction of the applicant's main studio facilities. g. Assuming that all of the funds upon which the applicant relies will be available to it, how the applicant will obtain sufficient additional funds to be used for the construction and first three months operation of the station.

2. The Commission in its designation Order questioned whether James C. Torres, a stockholder in Multi-State, had sufficient funds to fulfill his stock subscription agreement calling for Mr. Torres' purchase of thirty shares of Multi-State stock at a total cost of $8,250. Seeking deletion of Issue 1(a), Multi-State contends that the Commission overlooked petitioner's amendment of May 3, 1973, which contains a guarantee by a fellow stockholder in Multi-State, Mr. Abraham Miller, which reads:

> For value received and in consideration of the acceptance by the corporation of the foregoing subscription, the undersigned guarantees to the corporation the full performance and observance of all covenants, conditions, and agreements therein provided by the subscriber, James C. Torres, and expressly agrees that this guarantee shall not be terminated or affected by reason of the institution of

[1] The Board also has before it for consideration the following related pleadings: (a) opposition, filed May 20, 1974, by RKO; (b) opposition, filed May 20, 1974, by the Broadcast Bureau; (c) reply, filed June 7, 1974, by Multi-State.

any action or proceeding against the subscriber and/or extension of time for the payment of shares called from time to time, by the Board of Directors, and the undersigned expressly consents to any such extensions of time.

According to Multi-State, Mr. Miller subscribed to purchase $16,500 of Multi-State stock and submitted a balance sheet indicating that he had available liquid assets in excess of $57,000. Moreover, the applicant asserts that the most recent amendment to its application, dated April 18, 1974, shows that Mr. Torres' stock has been fully paid for and that such stock has been issued to him. Consequently, Multi-State argues that Issue 1(a) has been mooted and should be deleted. The Broadcast Bureau, in opposing the motion to delete, maintains that the motion is premature, since the April 18, 1974, amendment, upon which Multi-State relies, has not yet been accepted by the Presiding Judge. Furthermore, the Bureau avers that deletion is inappropriate here, since the basis for the deletion is information contained in a post-designation order amendment.

3. The Review Board is of the view that Issue 1(a) should be deleted. While we agree with the Broadcast Bureau's contention that ordinarily issues will not be deleted based on information contained in post-designation amendments, it appears here that the Commission overlooked the guarantee of Abraham Miller contained in the pre-designation amendment of May 3, 1973.[2] A perusal of Mr. Miller's balance sheet reveals that he has sufficient liquid assets to meet both his own and Mr. Torres' stock commitments. Therefore, this information— the guarantee and Mr. Miller's balance sheet—eliminates any doubt as to Mr. Torres' ability to meet his commitment to Multi-State and, accordingly, the issue will be deleted. *Cf. Centreville Broadcasting Co.*, FCC 71R-62, 21 RR 2d 216 (1971).

4. In its designation Order, the Commission questioned whether the applicant would have at its disposal the full amount of paid-in capital, $302,000, originally specified in its application. This uncertainty resulted in the Commission designating Issue 1(b). In its pleading, movant asserts that a current balance sheet reflecting the existence of $302,000 in paid-in capital was contained within the amendment Multi-State submitted on April 18, 1974. Consequently, Multi-State contends that the deletion of Issue 1(b) is dictated by this amendment. As indicated above, the Review Board has consistently held that it will not delete issues based upon information contained in post-designation order amendments, absent special circumstances. See, *e.g.*, *Radio Antilles, Inc.*, 20 FCC 2d 252, 17 RR 2d 613 (1969), and cases cited therein. Although Multi-State's April 18, 1974, amendment may provide a means by which to demonstrate the availability of the $302,000 at hearing, it does not warrant resolution of a factual question on the basis of a motion to delete. See *Orange Nine, Inc.*, 8 FCC 2d 637, 10 RR 2d 489 (1967). Therefore, the request to delete Issue 1(b) will be denied.

5. The Commission specified Issue 1(d) because it found that while Multi-State's application included an allocation of $300,000 for the

[2] The Commission in its designation Order made no reference to the guarantee provided by Mr. Miller. In fact, its only reference to Mr. Torres' financial status consists of the statement that "the applicant has failed to show how Mr. James C. Torres will obtain sufficient funds to meet his stock subscription commitment in the amount of $8,250."

rental of the transmitter site and building, it did not contain any reference to the cost associated with the construction or leasing of the applicant's main studio facilities. According to Multi-State, its amendment of March 9, 1973, clearly distinguished between a $100,000 allocation for rental of space for the transmitter and antenna, and an additional $200,000 allotment for the leasing of a building to house its studio facilities. Consequently, petitioner avers that Issue 1(d) was erroneously designated and should be deleted. The Review Board will not grant the motion to delete Issue 1(d). Multi-State's March 9, 1973, amendment lists, under operating expenses, the following:

Rent:	
Space (transmitter and antenna)	$100,000
Building	200,000

The amendment does not contain the explanatory material provided in Multi-State's motion to delete or any other indication that the word "Building" was meant to refer to a studio rather than a transmitter. Consequently, we agree with the Broadcast Bureau that Multi-State's failure to sufficiently specify whether funds had been allocated for studio facilities created a substantial ambiguity. Given this ambiguity, we cannot find that the Commission's designation of Issue 1(d) was mistaken. In so holding, we adhere to our long standing policy that uncertainties should be resolved at the evidentiary hearing, rather than on the basis of post-designation pleadings. A contrary approach "would be disruptive of the orderly and efficient disposition of the Commission's business." *Viking Television, Inc.*, 16 FCC 2d 1015, 15 RR 2d 968 (1968). See also, *Belo Broadcasting Corp.*, 42 FCC 2d 173, 28 RR 2d 87 (1973); and *Summit Broadcasting*, 18 FCC 2d 83, 16 RR 2d 434 (1969).

6. On the basis of data submitted in Multi-State's application, the Commission determined that the applicant would require at least $4,240,871 for the construction and operation of the station for three months, exclusive of revenues. In addition, the Commission stated that Multi-State had neither furnished it with information supporting its claim that it could obtain an antenna for the price ($100,000) indicated, nor with the costs associated with the construction or leasing of its studio facilities. Consequently, the Commission questioned how the applicant would obtain sufficient additional funds to construct and operate the station for three months. In support of its request for deletion of Issue 1(g), Multi-State asserts that the Commission overstated the applicant's overall financial needs for the three month period in question. According to Multi-State, it will not have to make either interest or principal payments on its equipment contract during this time period. Furthermore, movant contends that the amount of interest due on its bank loan during the initial three months is substantially lower than the figure arrived at by the Commission. Citing its own calculations, movant alleges that its three month costs will be only $4,099,150, and that it will have a surplus of available funds in an amount of $215,102.37. Consequently, Multi-State argues that the issue should be deleted.

7. The request for deletion of Issue 1(g) will be denied. We agree with both RKO and the Broadcast Bureau that Multi-State has not addressed itself to the fundamental question that led the Commission to designate Issue 1(g)—how the applicant will obtain sufficient additional funds to meet its construction and operating expenses for the first three months in light of its failure to allocate funds for the purchase of its antenna and the leasing or construction of its main studio facilities. As indicated previously (see paragraph 5, *supra*), petitioner has provided no adequate basis for deleting the issue regarding studio costs; nor has movant demonstrated that the Commission overlooked or misconstrued information relative to antenna costs either. Rather, the deficiencies respecting the antenna and studio costs were specifically referred to in the designation Order. *Cf. Edward G. Atsinger, III*, 30 FCC 2d 493, 22 RR 2d 236 (1971). Therefore, we believe the Commission's analysis was a reasoned one. See *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 8 RR 2d 991 (1966). Finally, even accepting Multi-State's own calculations, the applicant has not shown that its alleged surplus is sufficient to meet these substantial unallocated costs. Consequently, the Review Board will not delete Issue 1(g).

8. Accordingly, IT IS ORDERED, That the motion to delete issues, filed on April 25, 1974, by Multi-State Communications, Inc., IS GRANTED to the extent herein indicated, and IS DENIED in all other respects, and that Issue 1(a) in this proceeding IS DELETED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
REPUBLICAN HEADQUARTERS, CHATTANOOGA, TENN.
Concerning Political Broadcast, Section 315

JULY 12, 1974.

REPUBLICAN HEADQUARTERS,
110 East 7th Street,
Chattanooga, Tenn.

GENTLEMEN: This is in reference to your letter to the Commission dated June 14, 1974. You state that Mr. Edward Townson, candidate for sheriff, "recently carried a series of radio spots advertising his company, A–1 Moving and Storage"; that "both his name and his campaign slogan . . . were used"; that "[w]hile these were ostensibly ads for his company they were obviously designed to build his name recognition for purposes of his campaign"; that Mr. Franklin Haney, candidate for Governor of Tennessee, "recently ran a series of prime time television commercials for [the] Franklin Haney Company which pictured him as a 'builder of Tennessee' and showed his picture during almost the entire spot"; that Mr. Haney "only stopped these ads a few days before entering the campaign for Governor"; that none of the announcements carried a "disclaimer stating that they are made on behalf of a candidate"; and that "both candidates are hiding their political purposes behind their company's names."

We are enclosing for your information copies of the Commission's Public Notices of August 7, 1970 and March 16, 1972, entitled "Use of Broadcast Facilities by Candidates for Public Office." These documents contain the provisions of Section 315 of the Communications Act, amendments enacted by the Congress, the Commission's rules, regulations and guidelines promulgated thereunder, and representative rulings and interpretations. This material should serve to inform you, generally, as to the applicability and requisites of Section 315 in given situations.

Section 315 provides that if a licensee permits a legally qualified candidate for public office to use a station's facilities, that licensee must afford equal opportunities to all other legally qualified candidates for that office in the use of such broadcasting station.

As you will note, Q's and A's 10, 11, 12, 13, and 15 of Section III B of the 1970 Public Notice state that an appearance by a station owner, advertiser, employee, announcer or personality after he qualifies as a candidate for public office would constitute a use of the station's facilities within the meaning of Section 315 if he is identifiable to a substantial degree by the listening and viewing audience. There is no

prohibition of such appearances, but opposing candidates would be entitled to request "equal opportunities."

The Commission has stated that when a supporter or representative of a candidate appears and presents a "discussion of the candidate or the campaign issues" that this would constitute a presentation of a controversial issue of public importance and, under the fairness doctrine, the broadcaster would be required to afford a reasonable opportunity in his overall programming for the presentation of contrasting viewpoints. In such a case a supporter or representative of the opposing candidate would be the appropriate and logical spokesman for the opposing viewpoint, and, "barring unusual circumstances, it would be unreasonable for a licensee to refuse to sell time to spokesmen for or supporters of" the opposing candidate. *Letter to Nicholas Zapple*, 23 FCC 2d 707 (1970). However it cannot be determined from the information provided in your letter whether the use of Mr. Townson's "campaign slogan 'Walking Tall'" would constitute such a "discussion of the candidate or the campaign issues."

Enclosed for your information is a copy of the Commission's Public Notice of May 6, 1963, entitled "Applicability of Sponsorship Identification Rules." This public notice contains the provisions of Section 317 of the Communications Act and the Commission's rules and guidelines promulgated thereunder. As you will note, the sponsorship identification rules require that when a licensee broadcasts matter "for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by" the licensee, then the licensee must, at the time of the broadcast, announce that the matter is "paid for or furnished," as appropriate, and that the announcement "shall fully and fairly disclose the true identity of the person or persons by whom or in whose behalf such payment is made . . ." Where a legally qualified candidate makes an appearance in a commercial announcement for products or services there is no additional requirement that the announcement be identified as being made on behalf of his candidacy. The announcements which you cite in your complaint appear to be normal commercial product or service advertisements and there is no indication that their sponsorship was not properly identified.

In view of the above no Commission action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

FCC 74-757

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re TELEPROMPTER CABLE SYSTEMS, INC., D.B.A. JOHNSTOWN CABLE TV, JOHNSTOWN, PA.	Docket No. 20107 CAC-2785 (PA325)
AND TELEPROMPTER NEW JERSEY CABLE NETWORK, INC., TRENTON, N.J.	Docket No. 20108 CAC-664, CSR-257 (NJ105)
Applications for Certificates of Compliance	

ORDER

(Adopted July 9, 1974; Released July 11, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT. COMMISSIONER QUELLO DISSENTING AND ISSUING A STATEMENT.

1. In *TelePrompTer Cable Systems, Inc.*, 40 FCC 2d 1027 (1973), the Commission directed TelePrompTer Corporation to supplement its pending application for authorization to carry additional television signals on its cable television system at Johnstown, Pennsylvania with an application for a certificate of compliance under Sections 76.11(b) and 76.13(c). Pursuant to this directive, TelePrompTer filed the above-captioned Johnstown application. In addition, as noted in *TelePrompTer Cable Systems*, *supra*, the Commission already has on file an application for certificate of compliance for a new TelePrompTer cable system at Trenton, New Jersey (CAC-664). In considering the issues raised by these applications, and before reaching a final decision, the Commission would prefer to have the benefit of oral presentations by the interested parties.

2. Accordingly, IT IS ORDERED, That the above-captioned applications ARE SET for oral argument before the Commission on September 24, 1974, commencing at 9:30 a.m., in Room 856, 1919 M Street, N.W., Washington, D.C., to determine, in light of the conduct discussed in the opinion in 40 FCC 2d 1027, whether TelePrompTer is disqualified from operating cable television systems at Johnstown and Trenton. The parties are free to argue such associated issues as they believe relevant.

3. IT IS FURTHER ORDERED, That the parties who within 10 days after release of this Order file written notice of intention to participate in oral argument shall each be allowed 20 minutes for argument; that the parties may reallocate their time among themselves; that counsel for TelePrompTer Corporation may reserve part of his time for rebuttal; and that the order of appearance shall be:

TelePrompTer Corporation
Alleghany Area CATV Corporation
740 Associates
City of Johnstown
City of Trenton
Office of Cable Television, Department of Public Utilities, State of New Jersey
Special FCC Trial Staff
Cable Television Bureau

4. IT IS FURTHER ORDERED, That written briefs concerning the issues described in paragraph two above SHALL BE FILED on or before September 3, 1974.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

DISSENTING STATEMENT OF COMMISSIONER JAMES H. QUELLO

The issue here is not whether a specific cable system should be given or denied a certificate of compliance to operate in a specific city. The issue, as I see it, transcends the parties directly concerned and reaches out to a far broader and more fundamental question in this somewhat delicate, often frangible, area of dual responsibility for regulation contemplated in the FCC's own rules.

The Commission, in adopting its rules and through adherence to them in prior considerations, has placed the considerable burden of determining the legal, character, financial, etc. qualifications of those who would act as public trustees in the operation of cable systems directly upon local franchising authorities. This procedure presumes—and presumes correctly, in my view—that local bodies, after benefiting from participation by local citizenry, are best able to determine these qualities as they relate to the local situation.

In this instance, it seems to me, the Commission has decided to abandon this principle in order to substitute a federal judgment for a local one. It is argued that this case is not precedent-setting; that federal intervention into normally local processes is necessary, this one time, because of the transcending significance of this particular case. Stated another way, this matter is too important to be left to the local authorities. Ordinarily, in more or less routine matters, the principle of local authority is sound but, in matters of real significance, the decisions must be made in Washington. I'm afraid the logic of that escapes me.

One obvious result, despite protestations to the contrary, is that the FCC is to become the arbiter of matters which the Commission itself has heretofore deemed best left to local authorities. This, I believe, is not sound from either the local or the federal standpoint. If there is to be a genuine division of responsibility in this area, there must be a genuine division of authority with which to carry out that responsibility. If there is to be only an appearance of authority applied cosmetically to the local government, then the Commission must expose itself to public scrutiny of such a policy.

Presumably, the broad, fundamental question is the extent to which this agency and local franchising authorities can share the ultimate responsibility of serving the public interest. I believe that the Commission's rules, as written, contemplate such a sharing based upon sound principles of leaving to each authority those functions for which it is best equipped. Those functions which are nationwide in character and require conformance to national standards can best be performed right here. But, those matters of primary local concern and local judgment should be left in the hands of those most directly concerned with them.

Therefore, I dissent.

FCC 74-629

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF TRI-CITIES BROADCASTING CO., INC., LICENSEE OF RADIO STATION KWSH, WEWOKA, OKLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 17, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated July 3, 1973 (mailed July 6, 1973), addressed to Tri-Cities Broadcasting Co., Inc., licensee of Radio Station KWSH, Wewoka, Oklahoma, and (2) the licensee's response of July 26, 1973 to the Notice of Apparent Liability.

2. The Notice of Apparent Liability for $500 was issued for repeated failure to observe the following requirement of the station license: "Field measuring equipment shall be available at all times, and the field intensity of each of the monitoring points shall be measured at least once every seven days and an appropriate record kept of all measurements so made." It appeared from inspection of the station that records were available of field intensity measurements made on January 10 and 22, March 1, April 4, 11, and 24, May 16, June 6, and July 10, 1972, and that no records were available of any other measurements made during the period between January 10, 1972 and August 23, 1972.[1] The licensee had stated that the station's field intensity meter was stolen in January 1972, and that arrangements to borrow another meter to make the required measurements had not permitted regular measurements because of conflicts in sharing the meter with its owner.

3. In response to the Notice of Apparent Liability, the licensee did not deny the violations, but stated as follows:

The former President and General Manager of KWSH, regarded as a close and dear friend of the owner, was in complete charge of the operation of KWSH for many years prior to his retirement in January of 1972. In the few years before his retirement, he was in ill health and poor state of mind. This reflected directly upon KWSH's operation as indicated by financial losses shown on the FCC Financial Reports. Also, the broadcasting equipment, property, and building were allowed to deteriorate.

[1] The forfeiture proceeding was confined to those violations that occurred within one year prior to issuance of the Notice of Apparent Liability.

The licensee also stated that new equipment, including a field strength meter, had been purchased, and that since ". . . KWSH, under new management, has made major purchases and improvements, and is making a sincere effort to comply with FCC requirements, any consideration of the imposed fine would be welcomed and greatly appreciated."

4. We find that the licensee repeatedly failed to operate its station substantially as required by its license, as set forth above, during the period July 6, 1972 through August 23, 1972. Licensees will not be relieved of liability because the violations may have been due to the mismanagement of a former station manager (and licensee's president),[2] nor because actions have been taken to prevent recurrence of the violations. *El Centro Radio, Inc.*, 10 FCC 2d 229 (1967). Considering all the circumstances in this case, including the licensee's financial condition, we are not persuaded to set aside or reduce the forfeiture.

5. In view of the foregoing, IT IS ORDERED, That Tri-Cities Broadcasting Co., Inc., licensee of Radio Station KWSH, Wewoka, Oklahoma, FORFEIT to the United States the sum of five hundred dollars ($500) for repeated failure to operate its station substantially as set forth in its license. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument for $500 payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within 30 days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,

VINCENT J. MULLINS, *Secretary.*

[2] This is especially true here, where the violations continued for seven months after the retirement of the officer/employee blamed by the licensee for the violations.

FCC 74-642

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of VILLAGE CATV, INC., BELLA VISTA VILLAGE, ARK. For Certificate of Compliance	CAC-2142 AR083

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1974; released June 26, 1974)

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING IN THE RESULT.

1. On March 5, 1973, Village CATV, Inc. filed an application for a certificate of compliance in which it proposed to operate a new cable television system at Bella Vista Village, Arkansas, a resort development in an unincorporated area of Benton County, Arkansas, located within the Fayetteville, Arkansas smaller television market.[1] The applicant requests authorization to carry the following television signals:

KGTO-TV (NBC, Channel 36) Fayetteville, Arkansas
KYTV (NBC, Channel 3) Springfield, Missouri
KOAM-TV (NBC, Channel 7) Pittsburg, Kansas
KODE-TV (ABC, Channel 12) Joplin, Missouri
KUHI-TV (CBS, Channel 16) Joplin, Missouri
KFSA-TV (ABC/NBC, Channel 5) Ft. Smith, Arkansas
KOTV (CBS, Channel 6) Tulsa, Oklahoma
KTUL-TV (ABC, Channel 8) Tulsa, Oklahoma
KOED-TV (Educ., Channel 11) Tulsa, Oklahoma

The proposed signal carriage is consistent with the cable television rules, and the application is unopposed.

2. Village CATV, Inc. has submitted a private franchise agreement negotiated with the Bella Vista Village Property Owners Association,[2] in lieu of a franchise from a public governmental authority, because it contends that Benton County, Arkansas, has no power to issue a cable television franchise.[3] In support of its contention, Village CATV

[1] Bella Vista Village has a population of 1,050. The system will have a 12 channel capacity.

[2] The Bella Vista Village Property Owners Association is a non-profit corporation which provides police and fire protection, maintains streets, waterworks, and sewage. All property owners in the project are automatically members and must pay dues to the Association. The Board of Directors currently consists of seven members, five property owners, and two developers.

[3] The Arkansas Attorney General's office has confirmed that there is no statutory authority for Benton County to issue a cable television franchise.

furnishes a letter it received from the Honorable Ralph Bolain, County Judge of Benton County, Arkansas. The letter states in pertinent part:

> The area comprising the Bella Vista Village project lies within Benton County, Arkansas and does not lie within the confines of any other local governmental agency. You are advised that there is no statutory authority or other authority for Benton County, Arkansas, to grant an exclusive cable television franchise and from my familiarity with the above project the Bella Vista Village Property Owners Association, formerly Bella Vista Country Club, would be the proper entity to grant a franchise to operate a cable television system in the area comprising the Bella Vista Village project.[4]

3. The private franchise agreement negotiated between Village CATV and the Bella Vista Village Property Owners Association has the following provisions: (a) the grantee shall accomplish significant construction within one year after receiving FCC certification and shall thereafter equitably and reasonably extend energized trunk cable to a substantial percentage of the franchise area each year, such percentage to be determined by the franchising authority. (b) The term of the franchise is 15 years with a renewal term of 15 years. (c) The basic rates charged by the grantee to its residential customers are $5.00 for monthly subscriber fees and $25.00 for the initial connection fee. Rate increases shall be approved by the grantor subject to an appropriate public proceeding affording due process. (d) Complaints regarding service shall be made to a local agent of the grantee and will be handled within a reasonable time. (e) Modifications required and made mandatory by the Federal Communications Commission in regard to franchise standards shall be incorporated into the franchise agreement within one year of adoption of the modification. (f) No franchise fee is required. Furthermore, in subsequent correspondence, the Bella Vista Village Property Owners Association assured the Commission that it has examined Village CATV's legal, character, financial, and other qualifications, and found them to be adequate to provide satisfactory cable television service. The franchisee's construction arrangements were also examined and determined to be feasible and adequate. These findings were approved at regular meetings, after reasonable notice.

4. Although the franchise was granted by a property owners association, this association must be considered the appropriate franchising body in the absence of governmental authority. This is not a case where we must examine various assurances of compliance with our Rules provided by a cable system. Rather we have an action by the only body politic capable of acting and one which complies in all respects with our policies. It is probable to expect that we will receive other applications involving similar franchising procedures. All such applications will receive careful scrutiny. Where the franchises are found to be consistent with our Rules, and where it is shown that there is no governmental franchising authority, such private franchises will be considered appropriate authorizations. In this case we believe the fran-

[4] In a subsequent letter of March 19, 1974, Judge Bolain made the clarification that Benton County had no authority to grant a cable television franchise, exclusive or otherwise.

chise granted by Bella Vista Village Property Owners Association is consistent with our Rules and a proper authorization.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certification (CAC–2142), filed by Village CATV, Inc. IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-710

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WARREN CABLE TV, INC., WARREN, MICH. For Certificate of Compliance	CAC-3336 MI215

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1974; Released July 11, 1974)

BY THE COMMISSION:

1. On February 7, 1974, Warren Cable TV, Inc., filed the above-captioned application for a certificate of compliance for a proposed cable television system at Warren, Michigan, a community located within the Detroit, Michigan, major television market (#5). The system proposes to carry the following television broadcast signals:

WJBK-TV (CBS, Channel 2) Detroit, Michigan
WWJ-TV (NBC, Channel 4) Detroit, Michigan
WXYZ-TV (ABC, Channel 7) Detroit, Michigan
WXON (Ind., Channel 20) Detroit, Michigan
WGPR (CP, Channel 62) Detroit, Michigan
WTVS (Educ., Channel 56) Detroit, Michigan
WKBF-TV (Ind., Channel 61) Cleveland, Ohio
WUAB (Ind., Channel 43) Lorain, Ohio
CKLW (Ind., Channel 20) Windsor, Ontario, Canada

Warren's application is consistent with the Rules. The application is opposed by the Honorable James D. Gray, Michigan State Senator.

2. The franchise under which Warren proposes to operate was granted by the City of Warren on November 19, 1973, and complies with all of the provisions of Section 76.31 of the Rules. Senator Gray requests that the Commission withhold consideration of the Warren application pending further study by the Michigan Joint Legislative Cable TV Study Committee of which he is a member. His letter of opposition reads in pertinent part:

> The Committee possesses information which indicates that procedures for the granting of the franchise were not in the best interest of the citizens of that community. . .
>
> My further personal concern is that the franchise does not contain the substance of intent which should be inherent in such an instrument—being the initial franchise for the Detroit Metropolitan Area—and consequently, will invite emulation by neighboring municipal councils.

3. In its reply Warren argues that whatever knowledge the Committee may have with regard to the procedure followed by the City Council of Warren in granting the franchise, it has not been shared with the applicant. In addition to the specific sections of the franchise and the statements in its application which document the procedures fol-

lowed in awarding the franchise, Warren submits a letter by Floyd M. Underwood, Council Secretary, attesting that the procedures which were followed are in accordance with local law and this Commission's regulations. With respect to Senator Gray's statement that "the franchise does not contain the substance of intent which should be inherent in such an instrument . . . being the initial franchise for the Detroit Metropolitan area . . .," Warren argues that its proposed signal carriage and access proposal are in compliance with all appropriate Commission regulations and Senator Gray's statement is unclear. Finally, Warren asserts that its franchise was designed to comply with Commission standards and not for emulation by neighboring communities and as such should not be used as a vehicle by which Senator Gray challenges policy issues.

4. We must deny the opposition. We have before us an application which is consistent with the Commission's Rules. In keeping with our stated go, no-go policy we find no reason to delay certification of this system. Senator Gray's opposition is vague and raises no question of deviation from our rules by the proposed cable system.

In view of the foregoing, the Commission finds that a grant of the subject application is consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certificate of Compliance" filed by Warren Cable TV, Inc., for Warren, Michigan, IS GRANTED, and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the opposition filed by Senator Gray, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*